NAVAL WAR COLLEGE

INTERNATIONAL LAW SITUATIONS

WITH

SOLUTIONS AND NOTES

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PREFACE.

The international law situations discussed at the Naval War College in 1910, as in former years, were such as are likely to arise, in which naval officers may be required to act under urgent and difficult conditions, and in which the law and precedents are not well established. The Declaration of London has suggested certain questions, and for the purpose of these discussions it has been assumed to be binding.

Mr. George Grafton Wilson, lately appointed professor of international law at Harvard, and still lecturer at Brown University, where he was for many years professor, who was himself a delegate to the International Naval Conference at London, conducted the discussions this year with the same ability and the same appreciation of the point of view of the naval officer that he has displayed for the past ten years as lecturer on international law at the Naval War College.

Officers are invited to propose situations for future discussion, either cases that have occurred within their own experience or questions left unsettled by the recent Conventions of The Hague or by the Declaration of London.

An index will shortly be published to the ten volumes on international law of the years 1901 to 1910, inclusive.

R. P. Rodgers,
Rear Admiral, U. S. Navy,
President.

U. S. Naval War College,
Newport, R. I., October 18, 1910.

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International Law Situations,

WITH SOLUTIONS AND NOTES.

Situation I.

COALING WITHIN NEUTRAL JURISDICTION.

There is war between States X and Y. Other States are neutral.

(*a*) A detachment of armed vessels of State X puts in to port B of State Z for the purpose of coaling from colliers accompanying the detachment.

Y protests against this coaling.

The authorities of State Z inform the commander of the detachment that he will be allowed to take from the colliers coal sufficient only to proceed to the nearest home port or to a port already passed *en route* to port B, and that any other course would render State Z liable for breach of neutrality.

What are the rights in this case?

(*b*) Would the solution be the same if the colliers had been sent to port B to meet the detachment?

(*c*) Would the solution be different if the coaling were not in a port, but merely within the three-mile limit off the coast of State Z?

SOLUTION.

(*a*) State Z is competent to make the regulation allowing within neutral jurisdiction coal sufficient only to proceed to the nearest home port or to a port already passed *en route* to port B. State Z might be at liberty to adopt the rule of full bunker supply.

(*b*) The same regulation would apply in case of colliers sent to meet the belligerent fleet at the neutral port of State Z.

(*c*) The same regulation would apply if the coailng were not in port but merely within the three-mile limit off the coast of State Z.

NOTES.

Introduction.—The introduction of steam power in vessels is comparatively recent. International law has not developed sufficiently to cover all circumstances under which the supply of fuel for vessels might come in question. The rules which had been developed to cover sailing ships are not in all cases sufficient to meet the new conditions. Coaling became from the middle of the nineteenth century an increasingly important question in maritime warfare. Confusion naturally arose in the attempt to stretch old rules evolved to regulate the conduct of sailing ships so that their provisions would apply to steam vessels. The transport of coal by neutrals was sometimes confused with the supplying of coal in a neutral port.

Coaling, the Geneva arbitration.—The first extended discussion in regard to the supply of coal arose before the Geneva arbitration. Moore summarizes this very important discussion as follows:

> It was maintained in the case of the United States that an undue indulgence was shown to Confederate cruisers in the extent to which they were permitted to obtain supplies of coal in British ports, and that in this way they were enabled to use those ports as a base of hostile operations against the United States in violation of the duty defined in the second rule of the treaty. These allegations were denied in the British case.
>
> The British supplemental argument declared that supplies of coal in British ports were afforded equally and impartially to both the contending parties; that they were obtained, on the whole, more largely by ships of war of the United States than by the Confederate cruisers; and that such supplies were lawful under the principles of international law.
>
> Mr. Evarts, in his supplemental argument, and Mr. Waite, in another special argument, argued that the permission to take coal, unless properly restricted, amounted to permitting the belligerent to make use of the neutral ports as a base of naval operations, and that the Confederate cruisers were suffered to obtain supplies of coal in British ports to facilitate their belligerent operations.
>
> On this subject Count Sclopis expressed the following opinion:
>
> "I can only treat the question of the supply and shipment of coal as connected with the use of a base of naval operations directed against one of the belligerents, or as a flagrant case of contraband of war.

"I will not say that the simple fact of having allowed a greater amount of coal than was necessary to enable a vessel to reach the nearest port of its country constitutes in itself a sufficient grievance to call for an indemnity. As the Lord Chancellar of England said on the 12th of June, 1871, in the House of Lords, England and the United States equally hold the principle that it is no violation of international law to furnish arms to a belligerent. But if an excessive supply of coal is connected with other circumstances which show that it was used as a veritable *res hostilis*, then there is an infringement of the second rule of Article VI of the treaty. It is in this sense also that the same Lord Chancellor, in the speech before mentioned, explained the intention of the latter part of the said rule. Thus, when I see, for example, the *Florida* and the *Shenandoah* choose for their field of action, one, the stretch of sea between the Bahama Archipelago and Bermuda, to cruise there at its ease, and the other, Melbourne and Hobson's Bay, for the purposes, immediately carried out, of going to the Arctic seas, there to attack the whaling vessels, I can not but regard the supplies of coal in quantities sufficient for such purposes as infringements of the second rule of the sixth article."

Mr. Adams, in his opinion, said:

"This question of coals was little considered by writers on the law of nations, and by sovereign powers, until the present century. It has become one of the first importance, now that the motive power of all vessels is so greatly enhanced by it.

"The effect of this application of steam power has changed the character of war on the ocean, and invested with a greatly preponderant force those nations which possess most largely the best material for it within their own territories and the greatest number of maritime places over the globe where deposits may be conveniently provided for their use.

"It is needless to point out the superiority in this respect of the position of Great Britain. There seems no way of discussing the question other than through this example.

"Just in proportion to these advantages is the responsibility of that country when holding the situation of a neutral in time of war.

"The safest course in any critical emergency would be to deny altogether to supply the vessels of any of the belligerents, except perhaps when in positive distress.

"But such a policy would not fail to be regarded as selfish, illiberal, and unkind by all belligerents. It would inevitably lead to the acquisition and establishment of similar positions for themselves by other maritime powers, to be guarded with equal exclusiveness, and entailing upon them enormous and continual expenses to provide against rare emergencies.

"It is not therefore either just or in the interest of other powers, by exacting severe responsibilities of Great Britain in time of war, to force her either to deny all supplies, or, as a lighter risk, to engage herself in war.

"It is in this sense that I approach the arguments that have been presented in regard to the supply of coals given by great Britain to the insurgent American steamers as forming a base of operations.

"It must be noted that throughout the war of four years supplies of coal were furnished liberally at first, and more scantily afterwards, but still indiscriminately to both belligerents.

"The difficulty is obvious how to distinguish those cases of coals given to either of the parties as helping them impartially to other ports from those furnished as a base of hostile operations.

"Unquestionably, Commodore Wilkes, in the *Vanderbilt*, was very much aided in continuing his cruise at sea by the supplies obtained from British sources. Is this to be construed as getting a base of operations?

"It is plain that a line must be drawn somewhere, or else no neutral power will consent to furnish supplies to any belligerent whatever in time of war.

"So far as I am able to find my way out of this dilemma, it is in this wise:

"The supply of coals to a belligerent involves no responsibility to the neutral when it is made in response to a demand presented in good faith, with a single object of satisfying a legitimate purpose openly assigned.

"On the other hand, the same supply does involve a responsibility if it shall in any way be made to appear that the concession was made, either tacitly or by agreement, with a view to promote or complete the execution of a hostile act.

"Hence I perceive no other way to determine the degree of the responsibility of a neutral in these cases than by an examination of the evidence to show the *intent* of the grant in any specific case. Fraud or falsehood in such a case poisons everything it touches. Even indifference may degenerate into willful negligence, and that will impose a burden of proof to excuse it before responsibility can be relieved.

"This is the rule I have endeavored to apply in judging the nature of the cases complained of in the course of this arbitration."

Sir Alexander Cockburn contended that the term "base of naval operations" had no relation to the case of a vessel which, while cruising against an enemy's ships, puts into a port, and after obtaining necessary supplies again pursues her course, but that it referred to the use of a port or water as a place from which a fleet or a ship might watch an enemy and sally forth to attack him, with the possibility of falling back upon the port or water in question for fresh supplies, or shelter, or a renewal of operations. The term signified "a local position which serves as a point of departure and return in military operations, and with which a constant connection and communication can be kept up, and which may be fallen back upon whenever necessary."

Mr. Staempfli, in his opinion in the case of the *Sumter*, said:

"The permission given to the *Sumter* to remain and to take in coal at Trinidad does not in itself constitute a sufficient basis for accusing the

British authorities of having failed in the observance of their duties as neutrals, because this fact can not be considered by itself, since the *Sumter*, both before and after that time, was admitted into the ports of many other States, where it stayed and took in coal, and it is proved that the last supply she obtained to cross the Atlantic did not take place in a British port; so that it can not be held that the port of Trinidad served as a base of operations for the *Sumter*."

The tribunal of arbitration, in its award, said:

"In order to impart to supplies of coal a character inconsistent with the second rule, prohibiting the use of neutral ports or waters as a base of naval operations for a belligerent, it is necessary that the said supplies should be connected with special circumstances of time, of persons, or of place, which may combine to give them such character."

In signing the award, Viscount d'Itajubá made the following statement:

"Viscount d'Itajubá, while signing the decision, remarks, with regard to the recital concerning the supply of coals, that he is of opinion that every Government is free to furnish to the belligerents more or less of that article."

It did not appear that in any case Great Britain was held responsible for the acts of a vessel in consequence of supplies of coal. (4 Moore, International Arbitrations, p. 4097.)

Discussion of 1906.—Under Topic IV of the Naval War College International Law Topics and Discussions of 1906 (p. 66) the subject of supplying fuel and oil in a neutral port was considered. The development of the recognition of neutral obligations was set forth at that time in considerable detail. The proclamations of various States in recent wars are also shown, and the policy and practice of some of the more important States is discovered to be divergent. A regulation was proposed in 1906 as follows:

> The supply of fuel or oil within a neutral port to vessels in belligerent service in no case shall exceed what is necessary to make the total amount on board sufficient to reach the nearest unblockaded port of the belligerent vessel's own State or some nearer named destination.
>
> The supply may be subject to such other regulation as the neutral may deem expedient. (International Law Topics and Discussions, Naval War College, 1906, p. 87.)

The reasons for this conclusion in 1906 were based upon the general drift of policy and practice toward restriction, as shown in recent wars and in opinions of writers. In the way of a general statement as to the reasons for the regulation proposed in 1906 in answer to the question,

"What regulations should be made in regard to the supplying of fuel or oil to belligerent vessels in neutral ports?" it was said—

The proposition to limit the supply to the amount necessary to take the ship to the nearest port of her home country, which has been a form often used and was that approved by the Institute of International Law in 1898, leaves much to be desired. The nearest port may not be in the direction in which the vessel may be voyaging, or if it is it may not be a port suitable for the entrance of such a vessel. The gradual change in recent years has shown that this formula is not sufficient. Such words as the following have been added in certain proclamations: "Or to some nearer neutral destination," or that coal shall not be supplied to "a belligerent fleet proceeding either to the seat of war or to any position or positions on the line of route with the object of intercepting neutral ships on suspicion of carrying contraband of war."

In most declarations there has been a provision against allowing a neutral port to become a base for equipping a belligerent's vessel with coal, oil, or other supplies. By "base," as thus used, is meant a place to which the vessel frequently returns. The idea of "frequent," as thus used, is generally covered by the prohibition against taking a new supply of coal from the same neutral port till after the expiration of a period of three months. Some States, however, allow such supply within three months, provided permission is obtained from the proper authority.

It would seem to be evident that while the supplying of coal to a belligerent is not prohibited by international law, though it has been prohibited in many proclamations, yet the supplying of coal at such frequent intervals as would make the neutral port a base is generally regarded as prohibited by international law, as is practically admitted in the reply of France to Japan in 1905.

It seems to be the general opinion that the supply of fuel, etc., to belligerents should be somewhat retricted in neutral ports.

There are differences of opinion as to the extent of necessary restrictions. Doubtless there would be need of special restriction in special cases. Some degree of freedom should remain to the neutral in making provisions for special conditions. It would seem reasonable that the neutral should not afford a greater supply of coal or oil even for lubricating purposes than an amount sufficient to carry the vessel to the home port. The purpose is to guard against the furnishing of supplies for hostile uses and at the same time not to intern a vessel of a belligerent which may enter a neutral port. It would probably be desirable to restrict the supply of oil for purposes of fuel, which would be included under the general head of fuel, and for lubricating purposes, which makes necessary specific mention of oil. (Ibid., p. 86.)

International Law Situations, 1908.—The Naval War College in 1908 again considered the question of supply of coal in neutral waters after the Second Hague Peace Conference, 1907. The résumé of the reasoning upon which the conclusion of International Law Situation IV of 1908 was based is as follows:

By Article 1 of the Convention concerning the Rights and Duties of Neutral Powers in Naval War:

"*Belligerents are bound to respect the sovereign rights of neutral Powers and to abstain, in neutral territory or neutral waters, from all acts which would constitute on the part of the neutral Powers which knowingly permitted them, a nonfulfilment of their neutrality.*"

Unrestrained or repeated coaling in neutral waters, if knowingly permitted by a neutral, would unquestionably constitute a nonfulfilment of neutrality, and is therefore an act from which the belligerent is bound to refrain. Further, Article 18 of the same convention prohibits the use of territorial waters for "replenishing or increasing" supplies of "war material" or "armament." Coal destined for the belligerent forces has in recent years been regarded as war material. In Situation IV there has been within three months an actual increasing of the supply of war material within neutral jurisdiction. Under the spirit of Article 18, the taking on of coal would not be allowed to the war vessel of State X.

As is evident from the neutrality proclamations of recent years it is the purpose of neutrals to strictly limit the use of neutral territorial waters by belligerents to such purposes as the neutrals may specifically enumerate. In most proclamations prohibitions have been extended to ports, roadsteads, and territorial waters.

The provisions of the Convention concerning the Rights and Duties of Neutral Powers were agreed upon to harmonize divergent views. The divergency of view in regard to coaling was in regard to the amount rather than in regard to the frequency and place of coaling. This convention also provides that "it is expedient to take into consideration the general principles of the law of nations."

From the general principles set forth in the Convention, from the neutrality proclamations, from practice in recent wars, and from the general principles of the laws of nations it is evident that the contention of State Z (in Situation IV of 1908) is correct. Very wide freedom has been allowed to belligerents in matter of coaling. The use of any place within neutral jurisdiction, except under the terms of the convention regulating the supply of coal to belligerents, would be using such place as a base, which is prohibited. Certain propositions made by neutral States have not only prescribed the refusal of such supplies, but also the interning of a belligerent vessel which disregards such neutral regulations. (International Law Situations, Naval War College, 1908, p. 96.)

As cited in the notes upon this Situation IV of 1908, the United States delegation to the Second Hague Conference reported in regard to the matter of limitation of the supply of coal in neutral ports as follows:

Report of American delegation.—The proposition advanced by England represented the strict views of neutral rights and duties which are held by States maintaining powerful naval establishments, supplemented by a widely distributed system of coaling stations and ports of call, in which their merchant vessels could find convenient refuge at the outbreak of war and which enable them to carry on operations at sea quite independently of a resort to neutral ports for the procurement of coal or other supplies or for purposes of repair. As the policy of the United States Government has generally been one of strict neutrality, the delegation found itself in sympathy with this policy in many, if not most, of its essential details. France for many years past has taken a somewhat different view of its neutral obligations, and has practiced a liberal rather than a strict neutrality. The views of France in that regard have received some support from the Russian delegation and were favored to some extent by Germany and Austria.

It was constantly borne in mind by the delegation in all deliberations in committee that the United States is and always has been a permanently neutral power, and has always endeavored to secure the greatest enlargement of neutral privileges and immunities. Not only are its interests permanently neutral, but it is so fortunately situated, in respect to its military and naval establishments, as to be able to enforce respect for such neutral rights and obligations as flow from its essential rights of sovereignty and independence.

With a view, therefore, to secure to neutral States the greatest possible exemption from the burdens and hardships of war, the delegation of the United States gave constant support to the view that stipulations having for that purpose the definition of the rights and duties of neutrals should, as a rule, take the form of restrictions and prohibitions upon the belligerents, and should not, save in case of necessity, charge neutrals with the performance of specific duties. This rule was only departed from by the delegation in cases where weak neutral powers demanded and need the support of treaty stipulations in furtherance of their neutral duties. It was also borne in mind that a State resorting to certain acts with a view to prevent violations of its neutrality derives power to act from the fact of its sovereignty rather than from the stipulations of an international convention. (Senate Doc., 60th Cong., 1st sess., No. 444, p. 50.)

The solution of Situation IV of 1908 was to the effect that coaling by a vessel of war from a collier within the three-mile limit of the coast of a neutral State would be a just ground upon which the neutral could deny that

vessel of war the right to take coal within its ports till after three months had elapsed.

The amount of coal.—Situation I (*a*) of 1910 raises the question of the regulation of the amount of coal to be allowed to a belligerent in a neutral port or waters. The regulations suggested in the Naval War College conclusion in 1906 are not the same as those adopted at The Hague in 1907. The Hague regulations would be regarded as binding in most cases. The Hague Convention concerning the Rights and Duties of Neutral Powers in Naval War provides—

Article 19. Belligerent war ships may only revictual in neutral ports or roadsteads to bring up their supplies to the peace standard.

Similarly these vessels may only ship sufficient fuel to enable them to reach the nearest port in their own country. They may, on the other hand, fill up their bunkers built to carry fuel when in neutral countries which have adopted this method of determining the amount of fuel to be supplied.

If, in accordance with the law of the neutral power, the ships are not supplied with coal within twenty-four hours of their arrival the permissible duration of their stay is extended by twenty-four hours.

Proclamations as to amount of coal.—The proclamations issued in recent years as to the amount of coal to be allowed, in general not more often than once in three months, to a belligerent within a neutral port show the tendency toward regulation. The following are examples of regulations:

Denmark, 1904:

So much coal only may be taken in as may be necessary to carry such vessels to the nearest nonblockaded home port; or, with permission from the proper Danish authorities, to some other neutral destination. (U. S. Foreign Relations, 1904, p. 22.)

Netherlands Indies, 1904:

Sufficient provender may be shipped as is necessary for the maintenance of the crew, while the stock of fuel may not exceed an amount necessary for the vessel to reach the nearest harbor of the country to which the vessel belongs or of one of its allies in the war.

And in case of privateers it was provided that—

They shall not take in more provisions than is required for them to reach the nearest harbor of the country to which they belong or that of one of their allies in the war, and not more coal than is necessary to provide for their requirements for a period of twenty-four hours, sailing at a maximum of three English miles an hour. (Ibid., p. 28.)

Sweden-Norway, 1904:

In regard to coal, they can only purchase the necessary quantity to reach the nearest nonblockaded national port, or, with the consent of the authorities of the King, a neutral destination. (Ibid., p. 31).

United States, 1904:

No ship of war or privateer of either belligerent shall be permitted while in any port, harbor, roadstead, or waters within the jurisdiction of the United States, to take in any supplies except provisions and such other things as may be requisite for the subsistence of her crew, and except so much coal only as may be sufficient to carry such vessel, if without any sail power, to the nearest port of her own country; or in case the vessel is rigged to go under sail, and may also be propelled by steam power, then with half the quantity of coal which she would be entitled to receive, if dependent upon steam alone. (Ibid., p. 34.)

Bermuda, 1898:

No coal except for the specific purpose (to be satisfactorily shown) of enabling her to proceed direct to the nearest port of her own country or other named nearer neutral destination. (U. S. Foreign Relations, 1898, p. 844.)

Brazil, 1898:

The ships of belligerents shall take material for combustion only for the continuance of their voyage.

Furnishing coal to ships which sail the seas near Brazil for the purpose of making prizes of an enemy's vessels or prosecuting any other kind of hostile operations is prohibited. (Ibid., p. 848.)

China, 1898:

In coal only sufficient must be allowed to take it (the belligerent ship) to its nearest port. (Ibid., p. 853.)

Denmark, 1898:

Nor to take coal in greater quantity than is necessary to enable the vessel to arrive at the nearest port of its own country, or to some other destination nearer by. (Ibid., p. 857.)

Governor of Curaçao, 1898:

Nor more coal than is needed for their consumption for twenty-four hours at a maximum speed of 10 English miles per hour. (Ibid., p. 861.)

Great Britain, 1898:

So much coal only as may be sufficient to carry such vessel to the nearest port of her own country, or to some nearer destination. (Ibid., p. 869.)

Japan, 1898:

Coal necessary for the purpose of taking such men-of-war and such other ships to the nearest port of their own countries. (Ibid., p. 880.)

Netherlands, 1898:

Not more coal than is necessary to provide for their wants for twenty-four hours, sailing at a maximum pace of 10 English miles per hour. (Ibid., p. 889.)

These regulations of 1898 were in general reissued at the time of the Russo-Japanese war in 1904.

Many States would allow no coal to ships in possession of prizes. Some States required that a belligerent ship should obtain permission before coaling at all. Some made special provisions owing to the geographical situation of certain ports.

Naturally Great Britain would from the number and position of her ports be called upon to make definite rules. These were mentioned in the International Law Situations of the Naval War College of 1908.

According to the British proclamation of 1898:

Rule 3. No ship of war of either belligerent shall hereafter be permitted, while in any such port, roadstead, or waters subject to the territorial jurisdiction of Her Majesty, to take in any supplies, except provisions and such other things as may be requisite for the subsistence of her crew, and except so much coal only as may be sufficient to carry such vessel to the nearest port of her own country, or to some nearer destination, and no coal shall again be supplied to any such ship of war in the same or any other port, roadstead, or waters subject to the territorial jurisdiction of Her Majesty, without special permission, until after the expiration of three months from the time when such coal may have been last supplied to her within British waters as aforesaid.

This rule was amended to read "*nearer named neutral destination,*" in 1904.

Certain explanations of Rule 3 were later issued:

It must, however, be borne in mind that the reason for the practice of admitting belligerent vessels of war into neutral ports arises out of the exigencies of life at sea and the hospitality which it is customary to extend to vessels of friendly powers, and that this principle does not

extend to enabling such vessel to utilize a neutral port directly for the purpose of hostile operations. The rule above quoted is not to be understood as having any application to the case of a belligerant fleet proceeding either to the seat of war, or to a position or positions on the line of route, with the object of intercepting neutral vessels on suspicion of carrying contraband of war. Such fleet can not be permitted to make use in any way of a British port for the purpose of coaling, either directly from the shore, or from colliers accompanying the fleet, whether the vessels of the fleet present themselves at the port at the same time or successively. His Majesty's Government further directs that the same practice be pursued with reference to single belligerent war vessels, if it be clear that they are proceeding for the purpose of belligerent operations as above defined. This is not to be applied to the case of a vessel putting in on account of actual distress at sea.

The amount of coal which might be supplied to a belligerent warship was defined as so much as may be sufficient to carry such vessel to the nearest port of her own country, or to some nearer named neutral destination—a formula which would, e. g., entitle a Russian ship of war to take on board, say at Aden, an amount of coal sufficient to carry her to Vladivostok. The practice recognized under this rule, which is based upon considerations of hospitality, ought not, in the opinion of His Majesty's Government, to be extended so as to enable such vessels to make use of a neutral port directly for the purpose of hostile operations. Instructions had accordingly been given that the rule is not to be taken as applying to a belligerent fleet, or to vessels proceeding to the seat of war itself, or to stations from which operations connected with the war might be conducted. (Lord Lansdowne to Sir C. Hardinge, August 16, 1904.)

Malta proclamation of 1904.—In the proclamation of the Governor of Malta of August 12, 1904, there is a reference to and interpretation of the British rule—

We, therefore, in the name of His Majesty, order and direct that the above-quoted rule No. 3, published by proclamation No. 1 of the 12th February, 1904, inasmuch as it refers to the extent of coal which may be supplied to belligerent ships of war in British ports during the present war, shall not be understood as having any application in case of a belligerent fleet proceeding either to the seat of war or to any position or positions on the line of route with the object of intercepting neutral ships on suspicion of carrying contrabrand of war, and that such fleet shall not be permitted to make use in any way of any port, roadstead, or waters subject to the jurisdiction of His Majesty for the purpose of coaling, either directly from the shore or from colliers accompanying such fleet, whether vessels of such fleet present themselves to any such port or roadstead or within the said waters at the same time or successively; and, second, that the same practice shall be pursued with

reference to single belligerent ships of war proceeding for purpose of belligerent operations as above defined; provided that this is not to be applied to the case of vessels putting in on account of actual distress at sea, in which case the provision of rule No. 3 as published by proclamation No. 1 of the 12th February, 1904, shall be applicable.

It will be observed that this proclamation specifically announces the principle "that belligerent ships of war are admitted into neutral ports in view of exigencies of life at sea and the hospitality which it is customary to extend to vessels of friendly powers;" and that "this principle does not extend to enable belligerent ships of war to utilize neutral ports directly for the purpose of hostile operations." It is not the intention to extend hospitality to belligerent vessels proceeding to the seat of war or advancing for the purpose of belligerent operations, whether against other belligerents or against neutrals carrying contraband or otherwise involved in the war. In short, the doctrine would seem to involve the privilege of coaling for navigation to a home port, but no such privilege in order to reach the area of warfare or for direct hostile operations. This position taken by Great Britain is an advanced one. As was said in the discussions of the Naval War College in 1905, "It can not reasonably be expected that a neutral power will permit its own ports to be used as sources of supplies and coal, using which the belligerent vessel or fleet may set forth to seize the same neutral's commerce or interrupt its trade." (International Law Topics and Discussions, 1905, p. 158.)

Prof. Holland raises the question of supply of coal to a belligerent ship, and briefly summarizes the British practice as follows:

May she also replenish her stock of coal? To ask this question may obviously, under modern conditions and under certain circumstances, be equivalent to asking whether belligerent ships may receive in neutral harbors what will enable them to seek out their enemy, and to maneuver while attacking him. It was first raised during the American Civil War, in the first year of which the Duke of Newcastle instructed colonial governors that "with respect to the supplying in British jurisdiction of articles *ancipitis usus* (such, for instance, as coal), there is no ground for any interference whatever on the part of colonial authorities." But, by the following year, the question had been more maturely considered, and Lord John Russell directed, on January 31,

1862, that the ships of war of either belligerent should be supplied with "so much coal only as may be sufficient to carry such vessel to the nearest port of her own country, or to some nearer destination." Identical language was employed by Great Britain in 1870, 1885, and 1898, but in the British instructions of February 10, 1904, the last phrase was strengthened so as to run: "Or to some nearer *named neutral* destination." The Egyptian proclamation of February 12, 1904, superadds the requirement of a written declaration by the belligerent commander as to the destination of his ship and the quantity of coal remaining on board of her, and Mr. Balfour, on July 11, informed the House of Commons that "directions had been given for requiring an engagement that any belligerent man-of-war, supplied with coal to carry her to the nearest port of her own nation, would in fact proceed to that port direct." Finally a still stronger step was taken by the Government of this country, necessitated by the hostile advance toward eastern waters of the Russian Pacific Squadron. Instructions were issued to all British ports, on August 8, which, reciting that "belligerent ships of war are admitted into neutral ports in view of the exigencies of life at sea, and the hospitality which is customary to extend to vessels of friendly powers; but the principle does not extend to enable belligerent ships of war to utilize neutral ports directly for the purpose of hostile operations," goes on to direct that the rule previously promulgated, "inasmuch as it refers to the extent of coal which may be supplied to belligerent ships of war in British ports during the present war, shall not be understood as having any application to the case of a belligerent fleet proceeding either to the seat of war, or to any position or positions on the line of route, with the object of intercepting neutral ships on suspicion of carrying contraband of war, and that such fleets shall not be permitted to make use, in any way, of any port, roadstead, or waters, subject to the jurisdiction of His Majesty, for the purpose of coaling either directly from the shore or from colliers accompanying such fleet, whether vessels of such fleet present themselves to such port or roadstead, or within the said waters, at the same time or successively; and that the same practice shall be pursued with reference to single belligerent ships of war proceeding for the purpose of belligerent operations, as above defined, provided that this is not to be applied to the case of vessels putting in on account of actual distress at sea. (83 Fortnightly Review, 1905, p. 795.)

These neutrality regulations of 1898 and 1904 were issued by the States named, but France, Germany, and Austria-Hungary did not issue similarly detailed regulations. The policy of France has not been the same as that of those States whose proclamations have been cited. Germany has usually been content with a more or less definite utterance to the effect that she would remain neutral.

Opinion of Dr. Lawrence.—Speaking in regard to coaling in May, 1904, during the Russo-Japanese war, Dr. Lawrence, at that time lecturer on international law at the British Royal Naval College, stated the British position:

The case of coal is peculiar and unsatisfactory. There is great need of a further advance in the rules which deal with it. Before the application of steam to navigation no one gave it a thought in connection with warlike purposes. Belligerent ships were as little likely to ask for it as they are to-day to demand granite or sand. But when, in the middle of the last century, the navies of the world changed from sailing vessels to steamships, it suddenly became immensely important. Yet the law of nations, based upon the practice of nations, still regarded it as an innocent article which might be supplied without restraint to any belligerent ship whose commander was so curiously constituted as to want it. But in 1862 Great Britain led the way in an attempt to put it on a more satisfactory footing. Taking advantage of the power possessed by neutrals to make reasonable regulations for their own protection, she issued in the midst of the great American Civil War a number of rules which dealt, among other matters, with supplies of coal. They were limited almost exactly as they are in the present war. We have kept to our rules ever since, when neutral in a maritime struggle; and several powers, notably the United States, have adopted them. Meanwhile coal has become much more important for warlike purposes than it was in 1862. Without it a ship of war is a useless log. It is as essential for fighting purposes as ammunition, and much more essential for chasing or escaping. Moreover, the great increase in the size, or speed, or both, of modern vessels causes them to consume it in much greater quantities than before. A belligerent which can obtain full supplies of it in neutral harbors gains thereby an enormous advantage. The neutral may be perfectly willing to grant similar supplies to the other side, but its wants may never be so great, and consequently the assistance given to it may never be so effective. Besides it is of the essence of neutrality that no aid should be given to the belligerents, and this is by no means the same thing as giving aid to both equally. Is it not time we went further and prohibited all supplies of coal to belligerent vessels in our ports? Probably some powers would follow our example, as happened when we strengthened our rules in 1862. Certainly some would not. France, who has not yet come up to our standard of 40 years ago, and whose policy with regard to coal in warfare is to place no restrictions upon the trade in it, could hardly be expected to come into line with us at first. But if she persisted in granting supplies when most other countries refused them, she might lay herself open to awkward remonstrances and demands on the part of a belligerent who had suffered severely in consequence of her liberality. An experience like our own in the matter

of the Alabama claims might convert her to our views. But even if she remained unconverted, we could go on acting as we deem best. We have more to gain than most States by the changes I suggest. Their first result would be to make warships dependent upon the coal they obtained in their own ports, or from colliers sent out by their Government. We are better off for coaling stations than any other power, and we have greater facilities for keeping our fleets supplied by colliers. On the other hand, we have more to lose than most States by the present system, for our sea-borne trade is so enormous and so important that an enemy could do vast damage by means of two or three swift commerce destroyers, which might for a time obtain coal in neutral ports, though we had closed all their own against them. The Egyptian neutrality order of February 12, 1904, lays down that before the commander of a belligerent ship of war is allowed to obtain coal in any port of Egypt he must obtain an authorization from the authorities of the port specifying the amount which he may take, and such authorization is to be granted only after the receipt from him of a written statement setting forth his destination, and stating the amount of coal he has in his bunkers. Probably this is as far as it is possible to go at present. (Problems of Neutrality, Journal of the Royal United Service Institution, vol. 48, pt. 2, p. 922.)

Elsewhere Dr. Lawrence speaks of the absolute refusal of coal to belligerent ships of war in a neutral port:

No doubt we should be told that if such ships are no longer to be allowed to buy coal in our ports we can hardly claim for our merchantmen the right to carry it to their ports unmolested, as long as they are not ports of naval equipment. And yet this argument does not seem conclusive. An article of commerce may be so essential for hostile purposes that no warship ought to be supplied with it in neutral waters, and yet so essential for the ordinary purposes of civil life that it ought not to be prevented from reaching the peaceful inhabitants of belligerent countries. The two propositions are not inconsistent. If both are upheld in reference to coal, we can work for the abolition of the present liberty to supply it to combatant vessels when visiting neutral ports and harbors, and at the same time maintain that when it is sent abroad in the way of ordinary trade belligerents must treat it as conditionally and not absolutely contraband. But at present, as we have seen (see pp. 129–132), there can be no question of complete prohibition. All we can hope to gain is a rule which will deny coal in future to war vessels when they have broken the conditions on which neutrals allowed them to take a supply. Such an advance in strictness would in no way conflict with our existing doctrine that coal is properly placed among goods conditionally contraband. (War and Neutrality in the Far East, 2d ed., p. 161.)

Opinion of Prof. Westlake.—The principles enumerated in the British proclamations of 1862 were reaffirmed in

the proclamations of 1870 during the Franco-Prussian War and during the Spanish-American War of 1898. The regulations during the Russo-Japanese War of 1904–5 were more detailed and imposed greater restraint upon the belligerents particularly as regards the supply of coal.

Of these stricter rules Prof. Westlake says:

It is understood that the coal supplied under such a rule shall be used in proceeding to the destination which the commander of the ship named as being that of which the distance authorized the supply, and it may fairly be argued that in proceeding to that destination she shall make no captures, since her making any during a voyage which she had been expressly coaled for would constitute the neutral port her base of operations for the specific operation of war constituted by them; only if she is attacked during that voyage she may of course defend herself. But the legitimation by international practice, however faulty in principle, of the mere receipt of supplies without a specification of the use to which they are to be put, must imply the legitimation of any use to which they may be put. (International Law, Part II, War, p. 211.)

Hall's opinion.—Hall states the conditions under which neutral territory is sometimes used by belligerents:

Much the larger number of cases in which the conduct of a neutral forms the subject of complaint is when a belligerent uses the safety of neutral territory to prepare the means of ultimate hostility against his enemy, as by fitting out expeditions in it against a distant objective point, or by rendering it a general base of operations. In many such cases the limits of permissible action on the part of the belligerent, and of permissible indifference on the part of the neutral, have not yet been settled. Generally the neutral sovereignty is only violated constructively. The acts done by the offending belligerent do not involve force, and need not entail any interference with the supreme rights of the State in which they are performed. They may be, and often are, innocent as regards the neutral except in so far as they endanger the quiescence of his attitude toward the injured belligerent; and their true quality may be, and often is, perceptible only by their results. (International Law, 5th ed., p. 603.)

Speaking of the limitation to the amount necessary to reach the nearest home port and of refusal of a second supply till after three months he says:

There can be little doubt that no neutral States would now venture to fall below this measure of care; and there can be as little doubt that their conduct will be as right as it will be prudent. When vessels were at the mercy of the winds it was not possible to measure with accuracy the supplies which might be furnished to them, and as blockades were seldom continuously effective, and the nations which carried on distant

naval operations were all provided with colonies, questions could hardly spring from the use of foreign possessions as a source of supplies. Under the altered conditions of warfare matters are changed. When supplies can be meted out in accordance with the necessities of the case, to permit more to be obtained than can, in a reasonably liberal sense of the word, be called necessary for reaching a place of safety, is to provide the belligerent with means of aggressive action; and consequently to violate the essential principles of neutrality. (Ibid., p. 606.)

The States of the world represented at the Hague Conference in 1907 did not at that time, however, come up to Hall's standard in regard to limitation upon the supply of coal.

Opinions of continental writers.—Certain continental writers, inclining to less restriction upon the supply of coal than that proposed in the British and some other declarations, and particularly in the declaration of the Governor of Malta, have criticized these.

Such writers maintain that, while coal is essential for aggressive fighting on the part of a vessel of war, for a neutral to furnish coal is analogous to the furnishing of sails, masts, tar, and similar supplies to a ship of war before the days of steam navigation; that such supplies afforded to the belligerents whenever sought did not imply any violation of neutrality, as they were for purposes of navigation rather than for purposes of hostile combat. It is also maintained that, since the navigation of the seas is free to all, acts making navigation possible are not violations of neutrality but legitimate.

The claim is also made that coal is merely one form of supply. This is essential food for the engines while other supplies are essential for the personnel. Some say it would be as reasonable to limit one as the other; that to permit the repair of an engine and to forbid the supply of coal to run the engine is a manifest absurdity; that while it may be and is generally forbidden to sell arms for the crew of a ship of war, food and drink may be procured in a neutral port; similarly while a ship of war may not purchase armament and war materials, she may properly obtain such supply of coal as is necessary.

The fact that the belligerents may not reap equal advantages from the possibility of taking coal in a neutral

port is not due to any act of the neutral, but due to conditions which both belligerents might fully understand before entering upon the hostilities. To offer as a reason for refusing coal the argument that one belligerent might use the neutral port more for coaling would be equally applicable to most other permitted actions.

M. de Lapradelle who has particularly written upon this side of the question, says:

La neutralité ne doit pas faire à l'un des belligérants une autre condition qu'à l'autre. Mais la nature peut faire qu'entre eux les possibilitiés d'user de ces mêmes conditions soient différentes. Si les neutres devaient modifier leur droit toutes les fois que ces conditions changent, il n'y aurait plus de droit de la neutralité. Tel, que l'ennemi pense affamer, peut avoir plus besoin de vivres: est-ce une raison pour les déclarer contrebande de guerre? Tel peut avoir plus besoin que l'autre de s'arrêter dans les ports neutres; est-ce une raison pour les fermer? Tel peut avoir plus besoin de charbon; est-ce une raison pour le refuser? Là encore, dans le raisonnement adverse, il existe une confusion entre l'inégalité des conditions géographiques et l'inégalité des conditions militaires. Les unes et les autres ne doivent, en aucune manière, être modifiées, soit par l'action, soit par l'omission des États neutres. Les conditions militaires comprennent les unités de combat, l'armement, l'équipement; il n'est pas possible aux États neutres, ni d'en changer, ni d'en laisser, dans leur souveraineté, changer le rapport. Les conditions géographiques comprennent la proximité de tel point, l'éloignement de tel autre, la necessité de passer, de tel ou tel point, par tel ou tel autre. La faculté de relâcher dans les ports neutres et celle de prende du charbon s'y incorporent (1), car, dans l'état actuel de la navigation, elles sont les conditions mêmes de l'usage normal de la mer. L'un des belligérants se plaint-il que l'autre puisse venir l'attaquer par mer, en relâchant et en charbonnant dans les ports neutres? Autant se plaindre que, la terre les séparant, la mer ait comblé la distance, car la mer ne se conçoit pas sans les facultés naturelles à la navigation, et les conditions de la navigation ne se conçoivent pas autrement qu'en rapport avec les progrès de l'invention contemporaine. (La nouvelle thèse du refuse de charbon aux belligérents dans les eaux neutres, 11 Revue Générale de Droit Int. Public, 1904, p. 553).

Opinion of Prof. Hershey.—Prof. Hershey, writing of the coaling of the Russian fleet during the Russo-Japanese War, says:

Without the facilities for coal afforded it in neutral ports and waters (mainly French), it could not possibly have succeeded in circumnavigating the greater part of Europe, Asia, and Africa, with the avowed purpose of attacking the Japanese fleet. Not only have the French

"instructions" proven lamentably insufficient for the purpose of maintaining a real neutrality, but even a strict observance of the British and American rules would not have prevented that fleet from advancing from one neutral port to another by means of coal obtained at a previous port, or from using neutral coasts and waters as bases of supply, or as channels of transportation, even though the fleet itself had remained outside the three-mile limit. Nothing short of the total prohibitions contained in the proclamation of the Governor of Malta would seem to be sufficient for the maintenance of a strict or real neutrality. (International Law and Diplomacy of the Russo-Japanese War, p. 202.)

State Department opinion.—The following memorandum was given to the minister of the Netherlands by Secretary Hay in 1904:

[Memorandum.]

DEPARTMENT OF STATE,
Washington, February 16, 1904.

The minister of the Netherlands inquires whether the declaration of Japan that coal is contraband of war entails any restrictions of the rule that coal may be supplied to a man-of-war of a belligerent (in a neutral port) in sufficient quantity to reach the belligerent's nearest home port.

By the general rule of international law neutrals are free to sell contraband of war, even arms and ammunition, to a belligerent, subject always to the risk of seizure by the other belligerent. The recently issued neutrality proclamation of the President merely limits the right of citizens of the United States to sell coal within the jurisdiction of the United States to a belligerent war ship to a certain amount, namely, enough to take the vessel to its nearest home port.

As the United States Government understands the matter, the Japanese proclamation merely declares that coal is contraband of war, the effect being to serve notice that where Japan finds coal being carried to her enemy by neutrals she will seize it. This does not appear to conflict with the declaration in the President's proclamation, which has application within the territorial jurisdiction of the United States.

The receipt was acknowledged as follows:

WASHINGTON, *May 3, 1904.*

MR. SECRETARY OF STATE: The royal legation has not failed to forward to the Government of the Queen the memorandum relating to the Japanese declaration about the sale of coal during the actual war in the far Orient which accompanied the note which your excellency kindly addressed to it on February 16 last.

I have been instructed to transmit to the Government of the United States the thanks of the Royal Government for the memorandum of which it has taken notice with great interest and in which it fully concurs.

I take this occasion, etc.,

VAN SWINDEREN.

(U. S. Foreign Relations, 1904, p. 523.)

The Hague Convention of 1907.—The amount of coal which can be taken on board by a belligerent vessel in a neutral port is specified in the Hague Convention of 1907 concerning the Rights and Duties of Neutral Powers in Naval War. Of this provision the United States delegation in its report says:

Article 19 is an extremely important one. It provides that:

"ART. 19. *Belligerent vessels of war can not revictual in neutral ports and roads except to complete their normal supplies in time of peace.*

"*Neither can these vessels take on board fuel except to reach the nearest port of their own country. They may, however, take on the fuel necessary to fill their bunkers, properly so called, when they are in the waters of neutral countries which have adopted this method of determining the amount of fuel to be furnished.*

"*If, according to the rules of the neutral Power, vessels can only receive coal 24 hours after their arrival, the lawful duration of their sojourn shall be prolonged 24 hours.*

"ART. 20. *Belligerent vessels of war which have taken on board coal in the port of a neutral Power, can not renew their supply within three months in a port of the same Power.*"

The great Powers of the world are susceptible of being grouped into two classes in the matter of neutral policy. England, having great naval power, supplemented by an extensive system of coaling stations and commercial ports, has always favored and practiced a policy of strict neutrality. France, less powerful at sea, having few naval stations and with few distant colonial possessions, has been more liberal in the enforcement of its neutral obligations, and has allowed considerable aid to be extended to belligerent vessels in its ports. As England has treated both belligerents with impartial strictness, France has treated them with impartial liberality. With this view Russia and, to some extent, Germany and Austria are in sympathy. As has been seen, the policy of the United States has been in the main similar to that of Great Britain.

In the matter of coal the English delegation proposed that the amount of coal which a belligerent vessel might obtain in a neutral port should be restricted to quarter bunkers. The substantial operation of this rule would be that any public armed vessel that entered a neutral port short of coal would have to be interned until the close

of the war, as it would be impossible, in a majority of cases, to reach a home port with so meagre an allowance of coal as quarter-bunker capacity. This proposition was rejected, as were a number of suggestions based upon bunker capacity, condition of bottoms, etc., which were so complicated as to be practically impossible in their application.

The result was to reach the compromise which is stated in article 19, as to which it may be said that the liberal States have yielded rather more than those whose policy is one of strict neutrality. The article represents, it would seem, the most satisfactory conclusion possible for the Conference to reach. (Senate Doc. No. 444, 60th Cong., 1st Sess., p. 52.)

Discussion at The Hague in 1907.—The discussion at The Hague in 1907 showed that there were two distinct points of view in regard to belligerent coaling in a neutral port. One party claims that the determination of the amount on any such basis as the estimate of the number of tons necessary to reach the nearest home port is from the nature of the case impossible because of variations due to the conditions of ship, boilers, weather, quality of coal, etc. The other party claims that to allow the belligerent to take coal sufficient to fill the bunkers built to carry fuel would practically make the neutral coaling port a base for the belligerent.

Sir Ernest Satow, representing Great Britain, proposed to insert the following article:

> Une Puissance neutre ne devra pas permettre sciemment à un navire de guerre d'un belligérant se trouvant dans sa juridiction de prendre à bord des munitions, vivres ou combustibles pour aller à la rencontre de l'ennemi ou pour se livrer à des opérations de guerre. (Deuxième Conférence Internationale de la Paix, Tome III, p. 636.)

The representatives of Spain and Japan approved. Germany, United States, Denmark, France, Norway, Netherlands, Russia, and Sweden disapproved. Brazil, Italy, and Turkey refrained from voting. This vote was taken to show the attitude of the committee upon this restriction. It is evident that it was not favorable to placing upon the neutral any responsibility for determining for what end the ship may be taking supplies or coal and that the determination of the amount of coal within the allowed period is the main matter for the neutral.

The rejection of this British proposition gave evidence of the disposition on the part of several leading naval powers. They were not inclined to impose such restrictions as would make it necessary for the naval forces of a belligerent to be practically independent of neutral ports of call.

It was fully recognized at The Hague in 1907 that the interests of the several powers in time of war might be very diverse and that it might be difficult, if not impossible, to reconcile these interests in all respects.

M. Renault reviewed the difficulties upon this subject as follows:

La nécessité d'une réglementation précise ayant pour but d'écarter des difficultés et même des conflits dans cette partie du droit de la neutralité a été affirmée de tous les côtés. Ce n'étaient pas seulement des considérations théoriques, mais des expériences récentes qui la faisaient ressortir de la manière la plus saisissante.

La guerre continentale se poursuit en règle sur le territoire des deux belligérants. Sauf dans des circonstances exceptionelles, il n'y a pas contact direct entre les forces armées des belligérants et les autorités des pays neutres; quand ce contact se produit, quand des troupes doivent se réfugier sur un territoire neutre, la situation est relativement simple, le droit positif coutumier ou écrit l'a réglée d'une manière précise. Les choses vont autrement dans la guerre maritime. Les vaisseaux de guerre des belligérants ne peuvent toujours rester sur le théâtre des hostilités, ils ont besoin d'aller dans des ports et ils ne trouvent pas toujours à proximité des ports de leur pays. La situation géographique influe forcement ici sur la guerre, parce que les navires des belligérants n'auront pas un égal besoin de se rendre dans des ports neutres.

Résulte-t-il de là qu'ils aient droit d'y trouver et que les neutres puissent leur accorder un asile sans restriction? C'est ce qui est contesté. La différence qui vient d'être indiquée est la suite naturelle de ce qui se passe en temps de paix. Les forces armées d'un pays ne pénètrent jamais pendant la paix sur le territoire d'un autre Etat, de sorte qu'il n'y a rien de changé quand la guerre éclate; les forces armées doivent continuer à respecter le territoire neutre comme elles le faisaient auparavant. Il en est autrement pour les forces maritimes qui sont admises, en général, à fréquenter pendant la paix les ports des autres Etats. Si la guerre survient, les Etats neutres doivent-ils interrompre brusquement cette pratique du temps de paix? Peuvent-ils agir à leur guise ou la neutralité restreint-elle leur liberté d'action? Si le désarmement se conçoit quand une troupe belligérante pénètre sur le territoire neutre, parce qu'il s'agit d'un fait qui ne serait pas toléré en temps de paix, la situation est autre

pour le navire de guerre d'un belligérant qui arrive dans un port où il aurait pu régulierèment pénétrer en temps de paix et d'où il aurait pu librement partir.

Quel accueil ce navire va-t-il donc y recevoir? Que lui laissera-t-on faire? Il s'agit pour l'Etat neutre de concilier son droit de l'hospitalité avec le devoir de s'abstenir de toute participation aux hostilités. Cette conciliation qu'il appartient au neutre de faire dans le plein exercise de sa souveraineté n'est pas toujours aisée et ce qui le prouve, c'est la diversité des règles et des pratiques. Suivant les pays, le traitement qui doit être fait aux navires de guerre des belligérants dans un port neutre résulte de la législation permanents (Code italien de la marine marchande par exemple) ou des règles édictées à propos d'une guerre déterminée (Déclaration de neutralité). Non seulement les règles promulguées dans les divers pays diffèrent entre elles, mais un même pays ne prescrit pas des règles identiques à des époques rapprochées l'une de l'autre; de plus, parfois, les règles se modifient au cours de la guerre.

La chose essentielle, c'est que tous sachent à quoi s'en tenir et qu'il n'y ait pas de surprise. Les Etats neutres demandent avec instance des règles précises dont l'observation les nette à l'abri des récriminations de l'un et de l'autre des belligérants. Ils déclinent des obligations qui seraient souvent en disproportion avec leurs moyens et leurs ressources ou dont l'accomplissement supposerait de leur part de véritables mesures inquisitoriales.

Ce qui doit être le point de départ d'une réglementation, c'est la souveraineté de l'Etat neutre, qui ne peut être altérée par le seul fait d'une guerre à laquelle il entend demeurer etranger. Cette souveraineté doit être respectée par les belligérants qui ne peuvent l'impliquer dans la guerre ou le troubler par des actes d'hostilité.

Toutefois les neutres ne peuvent pas user de leur liberté comme en temps de paix, ils ne doivent pas faire abstraction de l'état de guerre. Aucun acte ou aucune tolérance de leur part ne peuvent licitement constituer une immixtion dans les opérations de guerre. Ils doivent de plus être impartiaux.

Il semble inutile de développer des considérations générales qui pourraient donner lieu à de longues discussions, la neutralité n'étant pas envisagée de la même façon par tout le monde. Il vaut mieux se borner à l'étude de propositions visant des cas déterminés que l'on règle naturellement en tenant compte des principes, mais qui se présentent d'une manière concrète et précise. (Deuxième Conférence Internationale de la Paix, Tome III, p. 466.)

Résumé of propositions at The Hague in 1907.—The propositions made by the representatives of the States at The Hague in 1907 resolved into two:

1. A belligerent ship of war may take in a neutral port fuel sufficient only to enable her to reach her nearest home port or some nearer neutral destination.

2. A belligerent ship of war may take in a neutral port fuel sufficient to fill her coal bunkers to the normal peace standard.

These propositions were somewhat differently stated by the representatives of the several States.

Spain:

Ils pourront, toutefois, se pourvoir des vivres et du charbon nécessaires pour atteindre le port le plus rapproché de leur pays ou un port neutre plus proche encore. (Deuxième Conférence Internationale de la Paix, Tome III, p. 701.)

Great Britain:

Une Puissance neutre ne devra pas permettre sciemment à un navire de guerre d'un belligérant se trouvant dans sa juridiction de prendre à bord des munitions, vivres ou combustibles si ce n'est dans le cas où les munitions, vivres ou combustibles déjà à bord du navire ne lui suffiraient pas pour gagner le port le plus proche de son propre pays; la quantité de munitions, vivres ou combustibles chargés à bord du navire dans la juridiction neutre ne devra en aucun cas dépasser le complément nécessaire pour lui permettre de gagner le port le plus proche de son propre pays. (Ibid., p. 697.)

Japan:

Les navires belligérants ne pourront dans les ports ou les eaux neutres, ni augmenter leurs forces de guerre, ni faire de réparations sauf celles qui seront indispensables à la sécurité de leur navigation, ni charger aucun approvisionnement excepté du charbon et des provisions suffisant avec ce qui reste encore à bord pour les mettre à même d'atteindre à une vitesse économique le port le plus rapproché de leur pays ou une destination neutre plus proche encore. (Ibid., p. 700.)

Russia:

Il est interdit aux bâtiments de guerre des Etats belligérants, pendant leur séjour dans les ports et les eaux territoriales neutres, d'augmenter, à l'aide des ressources puissées à terre, leur matériel de guerre ou de renforcer leur équipage.

Toutefois les bâtiments susmentionnés pourront se pourvoir de vivres, denrées, approvisionnements, charbon et moyens de réparation nécessaires à la subsistence de leur équipage ou à la continuation de leur navigation. (Ibid., p. 702.)

The report of the third commission, to which the consideration of the rights and duties of neutrals in case

of maritime war was intrusted, in presenting Article 19, says:

Nous arrivons à la question qui est, avec celle de la durée de séjour la plus important de la matière. Dans quelle mesure les navires de guerre des belligérants peuvent-ils s'approvisionner de vivres et de charbon dans les ports neutres?

La proposition russe (article 7) (Vol. III, Trois. Com. Annexe 48) dit que ces bâtiments pourront se pourvoir de vivres, denrées, approvisionnements, charbon et moyens de réparation nécessaires à la subsistence de leur équipage ou à la continuation de leur voyage. La proposition britannique (article 17) (Vol. III, Trois. Com. Annexe 44) dit que la quantité de munitions, vivres ou combustibles chargés à bord du navire dans la juridiction neutre ne devra, en aucun cas, dépasser le complément nécessaire pour lui permettre de gagner le port le plus proche de son propre pays. D'après la proposition japonaise (article 4) (Vol. III, Trois. Com. Annexe 46), les navires ne peuvent charger aucun approvisionnement, à l'exception du charbon et des provisions suffisant avec ce qui reste encore à bord, pour les mettre à même d'atteindre, à une vitesse économique, le port le plus rapproché de leur pays ou une destination neutre plus proche encore. Enfin, sans parler de ce qui pourrait être à bord, la proposition espagnole (article 5) (Vol. III, Trois. Com. Annexe 47) permet aux navires belligérants de se pourvoir des vivres et du charbon nécessaires pour atteindre le port le plus rapproché de leur pays ou un port neutre plus proche encore.

Il faut, tout d'abord, mettre à part le ravitaillement en dehors du combustible. La première règle de l'article 19, d'après laquelle les navires belligérants ne peuvent se ravitailler que pour compléter leur approvisionnement normal du temps de paix, a été acceptée sans difficulté.

Le débat n'a porté que sur le charbon, ou mieux sur le combustible, puisque le charbon n'est plus le seul combustible employé.

C'est depuis une quarantaine d'années que cette question a surgi et on en comprend toute l'importance, si l'on songe que, suivant une expression saisissante de S. Exc. M. Tcharykow, si un homme sans vivres est un cadavre, un navire sans charbon est une épave. Les efforts les plus grands ont été faits dans le Comité pour arriver à un systeme acceptable par les intéressés, qui sont les neutres et les belligérants éventuels. Pour ceux-ci, ils tiennent naturellement compte de leur situation géographique, qui leur rend plus ou moins nécessaire la faculté de se ravitailler dans des ports neutres; pour les premiers, ils peuvent demander une règle précise, qu'ils soient en mesure d'appliquer sans s'exposer à des récriminations des deux parts.

Des arguments ont été abondamment fournis en faveur de diverses solutions. Si on n'admet pas la règle britannique, qui est de nature, comme on l'a fait remarquer, à soulever diverses difficultés d'ordre pratique, et si, d'autre part, on ne veut pas du système de liberté

absolue, on peut concevoir et on a présenté des systèmes très divers pour déterminer la quantité de combustible qui pourra être chargée par le navire belligérant: la dotation normale, une quantité proportionnelle au déplacement ou au nombre des chevaux-vapeur, la quantité nécessaire pour parcourir une certaine distance, etc. Un comité technique chargé d'étudier la question n'a pu arriver à une solution unanime. La proposition allemande d'accorder aux belligérants la permission de compléter leurs soutes entières y a réuni 9 voix (Allemagne, Brésil, Danemark, France, Italie, Pays-Bas, Russie, Suède, Turquie) contre 5 (Etats-Unis d'Amérique, Espagne, Grande-Bretagne, Japon, Chine).

C'est dans ces conditions que la question a été soumise en seconde lecture au Comité d'Examen.

Il y avait en présence deux propositions:

1. La proposition britannique (Vol. III, Trois. Com. Annexe 44): Les navires ne peuvent prendre du combustible que pour gagner le port le plus proche de leur propre pays. Le sens de cette proposition a été nettement précisé par Sir Ernest Satow, en réponse a une question de M. Hagerup. La règle constitue un simple mode de calcul et ne crée pour le neutre aucune obligation d'avoir à surveiller la destination du navire requérant. Nous nous permettons d'ajouter qu'elle n'implique non plus aucune obligation pour le navire de se rendre à une destination quelconque. Ainsi seraient supprimées des contestations parfois souleveés.

2. Une proposition ainsi conçue: Ces navires ne peuvent prendre du combustible que por compléter leur plein normal du temps de paix.

S. Exc. M. Tcharykow a présenté, à titre transactionnel, la formule suivante: "Ces navires ne peuvent, de même, prendre du combustible que pour gagner le port le plus proche de leur propre pays. Ils peuvent, d'ailleurs, prendre le combustible nécessaire pour compléter leur plein des soutes proprement dites, quand ils se trouvent dans les pays neutres qui ont adopté ce mode de détermination du combustible à fournir."

Cette proposition a été acceptée par 11 voix (Allemagne, Brésil, Danemark, Espagne, France, Italie, Norvège, Pays-Bas, Russie, Suède, Turquie) avec 3 abstentions (Etats-Unis d'Amérique, Grande-Bretagne, Japon), après que la proposition faite par S. Exc. M. Tsudzuki en vue de la suppression de tout l'article eût été rejetée par 10 voix (Allemagne, Brésil, Danemark, France, Italie, Norvège, Pays-Bas, Russie, Suède, Turquie) contre 4 (Etats-Unis d'Amérique, Espagne, Grande-Bretagne, Japon).

Le ravitaillement ne peut suffire pour justifier la prolongation de la durée normale du séjour. Il faut toutefois tenir compte de la circonstance que, dans certains pays, un navire belligérant ne peut obtenir de charbon que 24 heures après son arrivée. (Article 249, alinéa 2, du Code italien de la marine marchande.)

Article 19. Les navires de guerre belligérants ne peuvent se ravitailler dans les ports et rades neutres que pour compléter leur approvisionnement normal du temps de paix.

Ces navires ne peuvent, de même, prendre du combustible que pour gagner le port le plus proche de leur propre pays. Ils peuvent, d'ailleurs, prendre le combustible nécessaire pour compléter le plein de leurs soutes proprement dites, quand ils se trouvent dans les pays neutres qui ont adopté ce mode de détermination du combustible à fournir.

Le ravitaillement et la prise de combustible ne donnent pas droit à prolonger la durée légale du séjour. Toutefois, si, d'après la loi de la Puissance neutre, ces navires reçoivent du charbon que 24 heures après leur arrivée, cette durée est prolongée de 24 heures.

(Deuxième Conférence Internationale de la Paix, Tome III, p. 505.)

The last paragraph of Article 19 was after discussion amended as follows:

Si, d'après la loi de la Puissance neutre, les navires ne reçoivent du charbon que vingt-quatre heures après leur arrivée, la durée legal de leur séjour est prolongée de vingt-quatre heures.

Report of American delegation.—It is proper to reprint here the clauses of the report of the United States delegation to the Second Hague Conference so far as this report bears upon the subject under consideration.

The proposition advanced by England represented the strict views of neutral rights and duties which are held by States maintaining powerful naval establishments, supplemented by a widely distributed system of coaling stations and ports of call, in which their merchant vessels could find convenient refuge at the outbreak of war and which enable them to carry on operations at sea quite independently of a resort to neutral ports for the procurement of coal or other supplies or for purposes of repair. As the policy of the United States Government has generally been one of strict neutrality, the delegation found itself in sympathy with this policy in many, if not most, of its essential details. France for many years past has taken a somewhat different view of its neutral obligations, and has practiced a liberal, rather than a strict, neutrality. The views of France in that regard have received some support from the Russian delegation and were favored to some extent by Germany and Austria.

It was constantly borne in mind by the delegation, in all deliberations in committee, that the United States is, and always has been, a permanently neutral power, and has always endeavored to secure the greatest enlargement of neutral privileges and immunities. Not only are its interests permanently neutral, but it is so fortunately situated, in respect to its military and naval establishments, as to be able to enforce respect for such neutral rights and obligations as flow from its essential rights of sovereignty and independence. (Senate Doc. No. 444, 60th Cong., 1st sess., p. 50.)

Coaling in the Spanish-American War.—In a telegram from Mr. Hay, the American ambassador in London, of June 29, 1898, when the Spanish fleet was supposed to be bound for the East, it was said:

British Government concludes Camara can not remain at Port Said more than 24 hours, except in case of necessity, and can not coal there if he has coal enough to take him back to Cadiz, which appears to be the case. (U. S. Foreign Relations, 1898, p. 983.)

It was said of the Spanish fleet bound westward that it also might find it difficult to obtain coal.

When, in the latter part of May, 1898, it was rumored that the Spanish armored squadron had sailed or was about to sail to the United States and might stop at the Azores for coal, the minister of the United States at Lisbon was instructed to protest against its coaling at those islands, on the ground that, as they lay entirely outside the route from Spain to the Spanish West Indies, such an act would convert the Portuguese territory into a base of hostile operations against the United States. (7 Moore, Int. Law Digest, 945.)

Prof. Moore quotes from a letter of the Secretary of State to the Secretary of the Navy of August 5, 1898, in regard to coaling of United States ships of war in Mexican waters:

Before the outbreak of hostilities the Pacific Mail Steamship Co. was permitted, under its agreement with the Mexican Government, to furnish supplies of coal to United States men-of-war at Acapulco. During the war the Mexican Government placed limitations on the supply of coal to belligerent vessels in its ports and made no exception as to United States vessels at Acapulco. The Department of State abstained from addressing any representation to Mexico on the subject, on the ground that as it had "on numerous recent occasions asked of Mexico the strict execution of its neutral duties," it was "not disposed, upon the strength of an agreement between the Pacific Mail Steamship Co. and the Mexican Government, made before the war, to insist that public ships of the United States may now be allowed to take coal without limit in a Mexican port." (7 Moore, Int. Law Digest, p. 946.)

Coaling in the Russo-Japanese War.—The proclamation of the Governor of Malta of August 12, 1904, declares that the provisions in regard to coaling—

shall not be understood as having any application in case of a belligerent fleet proceeding either to the seat of war or to any position or positions on the line of route with the object of intercepting neutral ships on suspicion of carrying contraband of war, and that such fleet shall not be permitted to make use in any way of any port, roadstead,

or waters subject to the jurisdiction of His Majesty for the purpose of coaling, either directly from the shore or from colliers accompanying such fleet, whether vessels of such fleet present themselves to any such port or roadstead or within the said waters at the same time or successively, and second, that the same practice shall be pursued with reference to single belligerent ships of war proceeding for purpose of belligerent operations as above defined. (Naval War College, International Law Situations, 1906, p. 78; also the London *Times*, Aug. 23, 1904.)

The notes issued by the Egyptian Minister of Foreign Affairs February 10 and 12, 1904, provide that coal shall be granted to belligerent ships of war only on written authorization from the port authorities specifying the amount, and that the port authorities shall grant such authorization "only after a written statement from the ship's commander shall have been obtained, stating the destination of his vessel and the quantity of coal already on board."

The royal ordinance of Sweden and Norway of April 30, 1904, interdicts "to war vessels of the belligerents entry to the territorial waters within the fixed submarine defenses, as well as to the following ports" (4 Swedish, 6 Norwegian). Entrance is accorded to vessels of war to other ports under the following rules:

They are forbidden to obtain any supplies except stores, provisions, and means for repairs necessary for the subsistence of the crew or for the security of navigation. In regard to coal, they can only purchase the necessary quantity to reach the nearest nonblockaded national port, or, with the consent of the authorities of the King, a neutral destination. Without special permission the same vessel will not be permitted to again purchase coal in a port or roadstead of Sweden or Norway within three months after the last purchase. (U. S. Foreign Relations, 1904, p. 31.)

The range of proclamations is from almost unlimited freedom of entrance to prohibition of entrance except under *force majeure*.

Coaling outside of port, but within neutral waters.—Situation IV of the Naval War College International Law Situations of 1908 was as follows:

Coaling in neutral waters.—While there is war between States X and Y and other States are neutral, a war vessel of State X coals from a collier just off the coast within three miles of State Z. A month later

the same war vessel enters a port of State Z and requests a reasonable supply of coal. This is refused, on the ground that the vessel has taken coal within the waters of State Z within three months.

The conclusion as a result of the conferences and of the consideration of the principles involved was that the contention of State Z under the circumstances was correct.

The Hague Convention on maritime jurisdiction.—The Hague Convention of 1907, respecting the Rights and Duties of Neutral Powers in Maritime War, provides:

ART. 1. *Belligerents are bound to respect the sovereign rights of neutral Powers and to abstain, in neutral territory or neutral waters, from all acts which would constitute on the part of the neutral Powers which knowingly permitted them, a nonfulfilment of their neutrality.*

* * * * * *

ART. 5. *Belligerents are forbidden to use neutral ports and waters as a base of naval operations against their adversaries.*

It is evident that the aim of these regulations is to prevent the use of neutral waters as a base of operations.

It is also evident from Article 19 of the above Convention that a State may allow coal sufficient only to reach the nearest home port, or, if it adopts the alternative method, then sufficient to fill the coal bunkers.

It is unquestionably within the power of a State to adopt either method.

Coaling within a port, whether from an accompanying collier or from a collier sent to the port to meet a fleet, would be acts of like nature, because taking place within the area clearly under the immediate jurisdiction of the port authorities.

Dr. Higgins on amount of coal.—Dr. A. Pearce Higgins, at present lecturer on international law at the British Royal Naval War College, summarizes the discussion at The Hague upon Article 19 of the Convention respecting the Rights and Duties of Neutral Powers in Maritime War so far as it relates to the amount of coal to be supplied in a neutral port as follows:

The second paragraph deals with the supply of fuel and gave rise to lengthy discussions. The British proposal (Article 17) said that the

quantity of provisions or fuel (*munitions, vivres ou combustibles*) taken on board in neutral jurisdiction should in no case exceed that which was necessary to enable it to reach the nearest port of its own country; the Japanese proposal added "or some nearer neutral destination;" the Spanish proposal was to the same effect. On the other hand it was contended by Germany, France, and Russia that belligerents should be allowed to take in enough fuel to complete their normal supply in time of peace. These two alternatives were considered by the examining committee on the 11th and 12th of September, 1907, and again at the full meeting of the third committee on the 4th of October, 1907. Admiral Siegel (Germany) contended that there was a great difficulty in arriving at the quantity of fuel necessary to take a ship to its nearest home port. It was necessary to ascertain what was the nearest port, what was its distance, the most economical speed, which would necessarily vary with the quality of the coal supplied, the state of the boilers, etc., the condition of the weather and a consequent lengthening of the voyage. These were burdens which should not be placed on neutrals. In support of the British proposal, Sir Ernest Satow argued that a neutral had no right to give assistance to a belligerent to reach his adversary; that the only reason why coal should be given to a belligerent ship was to prevent it from becoming a helpless derelict on the ocean; sufficient should therefore be given to enable it to preserve its existence, and this was the origin of the rule of the nearest home port, a rule which had been accepted by nearly all States which had issued rules on the subject. The Japanese delegate preferred the suppression of the provisions relating to coal in the Article to the acceptance of the German proposal but this was rejected by 10 to 4. The Russian proposal combined both tests as alternatives as stated in the second paragraph and this was carried in the examining committee by 11 votes, with 3 abstentions. (The Hague Peace Conferences, p. 475.)

Prof. Oppenheim's opinion.—Oppenheim maintains that—

> A neutral must prevent belligerent men-of-war admitted to his ports or maritime belt from taking in more provisions and coal than are necessary to bring them safely to the nearest port of their home State, for otherwise he would enable them to cruise on the open sea near his maritime belt for the purpose of attacking enemy vessels. And it must be specially observed that it matters not whether the man-of-war concerned intends to buy provisions and coal on land or to take them in from transport vessels which accompany or meet her in neutral waters. (2 International Law, p. 355.)

Application of discussion to Situation I.—(a) Right to regulate supply of fuel.—It is evident from practice and it is in accord with the Hague Convention that neutral powers "should issue specific enactments regulating the consequences of the status of neutrality whenever

adopted by them." It is an obligation resting on neutrals to apply these enactments impartially.

When, in time of war between States X and Y, the authorities of neutral State Z inform the commander of a detachment of armed vessels of State X, entering port B of State Z for the purpose of coaling from colliers accompanying the detachment, that he will be allowed to take from the colliers coal sufficient only to proceed to the nearest home port or to a port already passed *en route* to port B, the authorities are acting within their rights. A State has the right to make such regulations as it may regard necessary for the protection of its neutrality provided these do not violate conventions to which the State is a party. Such a restriction as State Z announces is in accord with the clause of Article 19 of the Hague Convention respecting the Rights and Duties of Neutral Powers in Maritime War, which provides that belligerent ships of war "may only ship sufficient fuel to enable them to reach the nearest port in their own country." The addition of the provision allowing the detachment to ship fuel sufficient to reach "a port already passed *en route*" does not deprive the belligerent of any right, but may enlarge his privileges.

The provision of the Hague Convention leaves to the neutral State the determination of the amount of fuel necessary, if the neutral State adopts as the standard the amount necessary to take the ships of war to the nearest home port. To deny this amount in a port which ships of war were permitted to enter would result practically in the internment of such ships. The protest of State Y against any coaling within port B of neutral State Z would not be valid. It has been recognized in recent years that coaling from colliers in a neutral port, if not in violation of the amount allowed and if not within the period during which coaling is prohibited because of previous coaling in a port of the same State, is not a breach of neutrality. Indeed it is considered that coaling from colliers accompanying a fleet, if under proper regulations, may be less in contravention of neutrality than taking a supply of coal from the merchants of a neutral State, since the

reserve coal supply of the belligerent would be by that amount reduced.

The protest of State Y is not valid. The rules established by State Z must, of course, be impartially applied.

State Z is competent to make the regulation mentioned in Situation I (*a*). The enforcement of the rule in case of the detachment of the fleet of State X is justified.

Certain aspects of the question as regards coaling in a neutral port or roadstead and coaling in neutral waters outside of these limits were discussed in Situation IV of the International Law Situations of 1908. It was stated (p. 97) that—

> As is evident from the neutrality proclamations of recent years, it is the purpose of neutrals to strictly limit the use of neutral territorial waters by belligerents to such purposes as the neutrals may specifically enumerate. In most proclamations prohibitions have been extended to ports, roadsteads, and territorial waters.

There is a difference in the actual degree of control which a neutral exercises over a port or roadstead and that which the neutral exercises over the territorial waters along the open coast. The Hague Convention of 1907, respecting the Rights and Duties of Neutral Powers in Maritime War, provides in Article 10 that—

The neutrality of a Power is not affected by the mere passage through its territorial waters of ships of war or of prizes belonging to belligerents.

Prizes belonging to belligerents are in general not to be brought into neutral ports except under stress of weather or other *force majeure*. Thus the status of a prize is not the same in a neutral port as in passage through neutral waters outside a port. The obligation of the neutral power to exercise jurisdiction does not extend in the same manner to the marine league along the coast as within its ports.

The United States declaration of neutrality in 1904, regulating the taking of coal by the belligerents during the Russo-Japanese war, extended to "any port, harbor, roadstead, or waters within the jurisdiction of the United States." The British wording is similar. Most of the other proclamations mention coaling in "neutral ports" only.

(*b*) *Colliers sent to meet fleet.*—In a neutral port coaling from the shore, from colliers accompanying the fleet, or from colliers sent to meet the fleet would be analogous. The acts would in each case be performed within jurisdiction of the authorities of the neutral port B. As explained above under (*a*), the neutral State Z has a right to make regulations for the protection of its neutrality and for the use of its ports by belligerents in time of war. The neutral State has, according to the Hague Convention respecting the Rights and Duties of Neutral Powers in Maritime War, Article 26, the right to enforce the regulations:

The exercise by a neutral Power of the rights laid down in the present Convention can never be considered as an unfriendly act by either belligerent who has accepted the Articles relating thereto.

This is simply an enunciation of the general principle that a neutral may protect its neutrality. Each neutral must judge what is necessary for such protection. If it is neglectful one belligerent may claim that it has not used "due diligence;" if it is too rigorous in the regulations and in their enforcement the other belligerent may feel aggrieved. It is, however, for the neutral to determine where the line shall be drawn.

In the situation under consideration there would be no difference in the solution owing to the fact that the colliers had been sent to the neutral port B, to meet the detachment of the fleet instead of accompanying the fleet. The explanation given of the British rule met with little objection when Lord Lansdowne wrote to Sir C. Hardinge on August 16, 1904, in regard to belligerent vessels that "Such fleet can not be permitted to make use in any way of a British port for the purpose of coaling, either directly from the shore or from colliers accompanying the fleet, whether the vessels of the fleet present themselves at the port at the same time or successively."

(*c*) *General control of waters.*—From all points of view it is evident that a neutral State can not exercise the same effective jurisdiction over remote waters along the coast as over the waters of the ports and roadsteads. The

time of arrival, the amount of coal taken, and other data necessary for the determination of the treatment of the belligerent fleet might not and probably would not be available.

While the obligation of the neutral according to article 25 of the Hague Convention concerning the Rights and Duties of Neutral Powers in Naval War is that "A neutral Power is bound to exercise such surveillance as the means at its disposal allow to prevent any violation of the provisions of the above Article occurring in its ports or roadsteads or in its waters," the belligerent is bound "to abstain, in neutral territory or neutral waters, from all acts which would constitute on the part of the neutral Powers which knowingly permitted them, a non-fulfilment of their neutrality." (Art. 1.) Such acts would be, if no provisions were announced to the contrary, sojourn for more than 24 hours (Art. 18), taking in more than coal sufficient to reach nearest home port (Art. 19).

Conclusion.—The obligation upon the belligerent is to observe the regulations prescribed by the neutral under penalty of denial of the use of neutral waters or such other measures as the neutral may be able to take (Art. 25). The neutral would be justified in regulating the supply of coal as specified in (*a*); the only difference would be in the fact that the neutral would not be under equal obligation to exercise surveillance over all coast waters.

SOLUTION.

(*a*) State Z is competent to make the regulation allowing within neutral jurisdiction coal sufficient only to proceed to the nearest home port or to a port already passed *en route* to port B. State Z might be at liberty to adopt the rule of full bunker supply.

(*b*) The same rule would apply in case of colliers sent to meet the belligerent fleet at the neutral port of State Z.

(*c*) The same rule would apply if the coaling were not in port but merely within the three-mile limit off the coast of State Z.

Situation II.

DECLARATION OF WAR.

The relations between the United States and State X are strained. The United States issues an ultimatum on July 1 to the effect that, if certain demands are not satisfied before July 10, war will exist from that date.

State X breaks off diplomatic relations with the United States on July 3 and announces that unless the demands of the United States are withdrawn before July 7 war will be declared on that date.

On July 8 a war vessel of the United States whose commander knows only that neither the United States nor State X has withdrawn its demands meets a merchant vessel of State Y which in case of war would be neutral. This vessel is known to be loaded with coal and is bound for a port of State X which, besides being a large commercial port, also contains a naval station.

What action should the commander take?

SOLUTION.

Unless exempt by treaty or otherwise the commander should send the merchant vessel of State Y to a prize court on the ground that the cargo was contraband of war if the vessel sailed with knowledge of the existence of the war.

If the vessel clearly had no knowledge of the existence of the war, he should consider that the cargo will probably be liable to expropriation rather than condemnation.

NOTES.

Historical.—It was in early times considered necessary that there should be some formal declaration of war. It was thought that a war should not be begun by what without State authorization might be regarded simply as a violent act of an individual. It was considered at one time that to commit an act of hostility before a public declaration of war would be perfidious.

It was the opinion in the eighteenth century that the State against which the war was to be waged and other States were entitled to demand that they be informed by a declaration of the purpose of a State to engage in war.

The Roman idea of a *bellum justum* involved a previous declaration. The ceremony of declaration was, however, a religious one and may have been rather to justify the war before the gods than before men.

The chivalry of the middle ages demanded a previous declaration and this was frequently formally carried to the ruler against whom the hostilities were to be waged. Such was the practice in the early part of the seventeenth century.

Grotius says that not only must a war to be just be waged by the sovereign authority, but it must be duly and formally declared. He distinguishes among wars allowing wars without declaration for the recovery of a State's own property or to ward off danger. He, however, maintains that in order to obtain the advantages flowing from the law of nations a declaration of war by one of the parties if not by both is essential. His treatise provides for the conditional declaration of war when it is conjoined with a demand for restitution. (De Jure Belli ac Pacis, Lib. III, cap. III.)

Bynkershoek in the early eighteenth century regarded declaration as the honorable method of entering on war, but not as absolutely essential, and before his period it had become more and more common for States to go to war without declaration. During the eighteenth century and the early ninteenth century the practice of declaration declined, and it was not till the latter half of the nineteenth century that there arose a movement in favor of declaration.

Maurice, in his book on "Hostilities without Declaration of War," covers the period between 1700 and 1870. Of 111 wars during this period he finds four formal declarations. Eleven declarations seem to have been made either formally or informally. In some instances diplomatic relations were broken off or some action involving an ultimatum was taken. A large number, perhaps

forty, seem to have been begun without declaration in order to take the enemy by surprise.

Since 1870 there have been thirty or more cases where States have resorted to arms. Some of these hostilities hardly deserve the dignity of the classification as wars. Domestic revolutions have often begun without declaration. The list includes:

Peruvian revolution, 1872.
Carlist revolution, Spain, 1873.
Balkan War, 1876.
Russo-Turkish War, 1877.
Afghan War, 1879.
Colombian revolution, 1879.
Chile-Peru-Bolivian War, 1879.
Anglo-Boer War, 1880.
Franco-Tunis campaign, 1881.
Egyptian campaign, 1882.
Haitian revolution, 1882.
Tonquin campaign, 1882.
Haitian revolution, 1883.
Franco-Chinese War, 1884.
Servia-Bulgarian War, 1885.
Burmese War, 1885.
Haitian revolution, 1888.
Argentine revolution, 1890.
Chilean revolution, 1891.
Brazilian revolution, 1891.
Venezuelan revolution, 1892.
Hawaiian revolution, 1893.
British-African War, 1893.
Chino-Japanese War, 1894.
Italian-Abysinnian War, 1894.
Cuban revolution, 1895.
Greco-Turkish War, 1897.
Spanish-American War, 1898.
South African War, 1899.
German-African War, 1903.
Russo-Japanese War, 1904.

Of these, hostilities consequent upon internal revolutions would ordinarily not be declared nor would hostilities upon uncivilized tribes. But of the entire list there were only nine declarations, of which five might be considered preliminary.

Before 1907 *post facto* declarations were common; even the United States Congress, with which rests the power to declare war, declared on April 25, 1898, "that war exists and that war has existed since the 21st day of April, A. D. 1898, including said day, between the United States of America and the Kingdom of Spain."

From this review of more than two hundred years it is evident that preliminary declarations were rarely issued during the eighteenth and nineteenth centuries.

Reasons for a declaration of war.—If war were simply a fact without legal consequences, there might be reasons why a declaration should not be regarded as necessary in all cases. War gives rise to certain legal consequences. The relations of citizens of the belligerent States to one

another are changed. The relations of citizens of belligerent and of neutral States are changed. The relations and obligations of the neutral States and of citizens of neutral States to the belligerents are changed. The neutral State is bound to prohibit certain actions ordinarily permitted. The citizen of a neutral State is liable to treatment which in time of peace would not be tolerated. A neutral State in time of war may not sell arms to a belligerent State. A neutral merchant vessel in time of war must tolerate visit and search and other restrictions upon her freedom.

The custom developed during the eighteenth and nineteenth centuries of dating the beginning of war from the date of the first act of hostilities, but in practice that was not easy to determine. The courts of different States have given different interpretations to the phrase "first act of hostilities." Indeed, the courts of one State have at different periods and in different cases given different interpretations to the phrase. When wars were mainly upon land and the interests and well-being of States not concerned in the hostilities were not greatly affected the necessity of a declaration of the time at which war existed or would exist was not so essential.

Moral obligation to declare war.—Prof. Westlake sets forth the moral obligation to make a declaration:

> The wars between the continental powers in the seventeenth and eighteenth centuries were often commenced in fact before their declaration, and were sometimes carried through without any declaration, quite as a matter of course, without that confused reference to reprisals as a distinct institution, which helped to warp the thoughts and the conduct of the maritime powers. Thus on all sides the habit arose of regarding lawful war—that is, war with all its legal effects, as commenced no less by fact than by declaration, and dating it from the commencement of hostilities. By that term, if we try to put a definite meaning on it, we must understand the first act of force done with the intent of war and not with that of reprisals or pacific blockade, or the first act of force done with the intent of reprisals or pacific blockade if a war follows, or the first act of force done with whatever intent—self-defense, seizing what is called a material guarantee, or any other—which the State affected by it chooses to regard as one of war. Nor is it possible to refuse its legal effects to a state of war so entered on or to date its commencement as between the parties otherwise. But from

the point of view of political morality it can not be too strongly maintained that so serious a step as the entrance on a state of war ought not to be taken without the deliberation for which the only security approaching to adequacy is the necessity of expression. No power doing an act of force with the intent of war, nor any power treating as war an act of force done by another, is morally justified in omitting to accompany its conduct by some kind of declaration. Nor again is any power doing an act of force morally justified in not having a clear view whether it intends it as war or not. If an act of force affects third powers and they submit to it, deeming at the same time that it places them in the position of neutrals in war with neutral rights and duties, they can scarcely avoid stating the view which they take of the situation. (International Law, Part II, War, p. 22.)

Hague Convention, opening of hostilities.—The Second Hague Conference proposed and adopted a Convention Relative to the Opening of Hostilities. The Convention was ratified by the United States March 10, 1908.

The official French text is as follows:

ART. 1. *Les Puissances contractantes reconnaissent que les hostilités entre elles ne doivent pas commencer sans un avertissement préalable et non équivoque, qui aura, soit la forme d'une déclaration de guerre motivée, soit celle d'un ultimatum avec déclaration de guerre conditionnelle.*

ART. 2. *L'état de guerre devra être notifié sans retard aux Puissances neutres et ne produira effet à leur égard qu'après réception d'une notification qui pourra être faite méme par voie telegraphique. Toutefois les Puissances neutres ne pourraient invoquer l'absence de notification, s'il était établi d'une manière non douteuse qu'en fait elles connaissaient l'état de guerre.*

Article 1 is as proposed by the French delegation at the Hague Conference of 1907 at the session of the second commission on June 22, 1907. This proposition was seconded by the Belgian delegation. The Belgian delegate pointed out the uncertainty of practice and opinion as to the necessity of a declaration of war before engaging in hostilities. The Netherlands delegate said, in the discussion before the second subcommission, on July 5, 1907:

II. "Convient-il"—est demandé ensuite—"que l'ouverture des hostilités soit précédée d'une déclaration de guerre ou d'un acte équivalent?"

Notre point de vue en cet égard est le même que l'Institut de droit international a exprimé dans sa session de Gand au mois de septembre de l'année passée.

Il est conforme aux exigences de l'esprit du droit international moderne, à la loyauté que les nations se doivent dans leurs rapports mutuels, ainsi qu'à l'intérêt commun de tous les Etats que les hostilités ne puissent commencer sans un avertissement préalable et non équivoque.

Pourquoi? Pour des raisons qui, selon moi, se trouvent sous la main.

On demande le désarmement. Pourquoi donc, ne commencerions-nous pas par ce qui est très-facilement à atteindre? Si cela ne mène pas directement et ostensiblement au but voulu, du moins cela contribuera indirectement à ce que les Etats n'aient pas autant besoin de rester armés en temps de paix, pour ne pas être pris à l'improviste.

De plus, pour tant de relations commerciales qui de nos jours se sont développées si extraordinairement, il importe que le moment où la guerre, qui bouleverse et change tout, a commencé, soit fixé et puisse être déterminé exactement.

III. À la troisième question: "Convient-il de fixer un délai qui devra s'écouler entre la notification d'un tel acte et l'ouverture des hostilités?" ma réponse est encore affirmative.

C'est pour cette raison que je me suis permis d'amender la proposition de la Délégation française avec laquelle je suis au reste d'accord.

Il me semble que dans une matière d'aussi grande importance que celle qui nous occupe, il est désirable de préciser et d'éviter les termes vagues.

Or, si l'on ne précise pas ce que l'on désire et veut atteindre avec le terme *avertissement préalable*, cet avertissement en peut être un, envoyé à l'adversaire une heure, même une demie-heure ou moins encore avant que les soldats passent la frontière. Il va sans dire que le *préalable* ne sert alors à rien.

Veut-on écarter les surprises, désire-t-on prévenir que l'avertissement ne devienne à cet égard qu'une simple forme, aime-t-on à contribuer au tranquille développement des relations pacifiques des peuples, alors il faut fixer un délai et mettre au moins un intervalle de 24 heures, et, comme il me semble que c'est bien le moindre qu'on puisse donner, j'aurai l'honneur de le proposer. (Deuxiéme Conférence Internationale de la Paix, Tome III, p 166.)

The *Comité d'Examen*, which considered the proposed rules, reported that the question of opening of hostilities without declaration had often led to recriminations on the part of the belligerents; that it was certainly expedient that there be some definite regulation. The two propositions were from France and the Netherlands, France proposing that there be a declaration prior to hostilities and the Netherlands that there be in addition a delay of

24 hours. It was decided that there ought to be a previous unequivocal declaration before the commencement of hostilities.

In the words of the *Comité d' Examen*—

La disposition principale, inspirée par une résolution de l'Institut de droit international (Session de Gand, septembre 1906), se justifie aisément. Elle prévoit deux cas distincts. Une difficulté surgit entre deux Etats: elle donnera ordinairement lieu à des négociations diplomatiques plus ou moins longues dans lesquelles chaque partie cherche à faire reconnaître ses prétentions ou tout au moins à obtenir une satisfaction partielle. L'accord ne se réalisant pas, l'une des Puissances peut déterminer dans un ultimatum les conditions qu'elle exige et dont elle déclare ne pas vouloir se départir en fixant un délai pour la réponse et en déclarant que, en l'absence de réponse satisfaisante, elle recourra aux armes. Dans ce cas, il n'y a aucune surprise et aucune équivoque. La Puissance à laquelle s'adresse un pareil ultimatum peut se décider en connaissance de cause, satisfaire son adversaire ou se préparer à combattre.

Le conflit peut surgir brusquement et une Puissance peut vouloir recourir aux armes sans tenter ou prolonger des négociations diplomatiques jugées inutiles. Elle doit alors avertir directement son adversaire de son intention et cet avertissement doit être non équivoque.

Quand l'intention de recourir aux armes est formulée conditionnellement dans un ultimatum, elle est forcément motivée, puisque la guerre doit être la conséquence du refus des satisfactions demandées. Il n'en est pas nécessairement ainsi quand l'intention de faire la guerre est manifestée directement et sans ultimatum antérieur. La proposition veut que l'intention soit aussi motivée dans ce cas. Un Gouvernement ne doit pas recourir à une résolution aussi extrême que la guerre sans la motiver. Il faut que tout le monde, dans les deux pays qui vont être belligérants comme dans les pays neutres, sache pourquoi l'on va se battre, afin qu'un jugement puisse être porté sur la conduite des deux adversaires. Sans doute, on ne saurait se faire l'illusion de croire que les véritables causes de la guerre seront toujours indiquées; mais la difficulté d'indiquer ces causes, la nécessité de mettre en avant des causes n'ayant rien de fondé ou en disproportion avec le fait même de la guerre, sont de nature à attirer l'attention des Puissances neutres et à éclairer l'opinion publique.

L'avertissement doit être préalable en ce sens qu'il doit précéder les hostilités. S'écoulera-t-il un certain temps entre la réception de l'avertissement et l'ouverture des hostilités? La proposition française ne fixe aucun délai, ce qui implique que les hostilités peuvent commencer dès que l'avertissement est parvenu à l'adversaire. La limitation de la guerre dans le temps est ainsi moins nettement déterminée que dans le cas de l'ultimatum. La Délégation française avait estimé que les nécessités de la guerre moderne ne permettent pas de demander,

à celui qui a la volonté d'attaquer, d'autres délais que ceux qui sont absolument indispensables pour que son adversaire sache que la force va être employée contre lui. (Ibid., Tome I, p. 132.)

Of the arguments in favor of a delay of 24 hours the *Comité* said:

On ne saurait nier la force de ces raisons qui n'ont cependant pas convaincu la majorité de la Sous-Commission. La fixation d'un délai n'a pas paru conciliable avec les exigences militaires actuelles; c'est déjà un progrès que d'avoir fair admettre la nécessité d'un avertissement préalable. Espérons que l'avenir permettra d'en réaliser un autre, mais n'allons pas trop vite. Il est à remarquer que *l'Institut de droit international*, dans la resolution à laquelle il a été fait allusion plus haut, n'a pas cru non plus pouvoir suggérer la fixation d'un délai, bien que, dans cet ordre d'idées, une assemblée de jurisconsultes puisse être moins réservée qu'une assemblée de diplomates, de militaires et de marins. Il s'est borné à dire ceci: "Les hostilités ne pourront commencer qu'après l'expiration d'un délai suffisant pour que la règle de l'avertissement préalable et non équivoque ne puisse être considérée comme éludée. (Ibid., Tome I, p. 133.)

The proposition made by the French delegation at the Second Hague Conference in 1907, as said by the *Comité d'Examen,* was based upon the resolution of the Institut de Droit International at Ghent in September, 1906, which may be translated as follows:

(1) It is in accordance with the requirements of international law, and with the spirit of loyalty which nations owe to each other in their mutual relations, as well as in the common interest of all States, that hostilities should not commence without previous and unequivocal notice.

(2) This notice may take the form of a declaration of war pure and simple, or that of an ultimatum, duly notified to the adversary by the State about to commence war.

(3) Hostilities should not begin till after the expiry of a delay sufficient to insure that the rule of previous and unequivocal notice may not be considered as evaded. (Higgins, The Hague Peace Conferences, p. 203.)

The Conference was mainly concerned not with the historical aspects, but rather with the expediency of introducing a regulation for the declaration of war. The Dutch delegation introduced the proposition that hostilities should not commence till 24 hours at least after an unequivocal declaration.

The Dutch proposition received the support of the Russian delegate.

Le problème d'un tel délai est étroitement lié avec la question du rapport qui existe, dans chaque pays, entre les effectifs de paix et les effectifs de guerre. C'est donc, par conséquent, une question de réduction de dépenses plus ou moins considérable. Le temps n'est peut-être pas si éloigné où nous pourrons distinguer entre les effectifs et les préparations de guerre, que chaque pays, en pleine souveraineté de sa décision, juge conformes à sa situation politique et ceux qu'il est obligé de maintenir, uniquement en vue de la nécessité d'être à tout instant sur le qui-vive. En établissant un certain délai entre la rupture des relations de paix et le commencement des hostilités, nous donnerions au pays le moyen, à qui le couvrait, de réaliser certaines économies pendant les périodes de paix. Ces économies seraient incontestablement bienfaisantes, de part et d'autre, et ne seraient pas sans apporter une grande détente dans l'état de la paix armée, détente d'autant plus facile à accepter qu'elle ne toucherait en rien au droit de chaque nation d'établir ses armements et ses effectifs uniquement d'après ses propres vues et nécessités.

Le délai dont il s'agit aurait encore un autre avantage: il donnerait aux Puissances amies et neutres un temps précieux que celles-ci pourraient employer à faire des efforts de réconciliation, à persuader les nations en litige de porter leurs différends même ici devant la Haute Cour d'arbitrage. Mais, en parlant de délai, il ne nous faut pas perdre de vue, cependant, les possibilités présentes. L'idée d'un délai considérable n'est pas encore mûre dans la conscience des peuples. Peut-être serait-il utile, par conséquent, de ne pas aller dans nos désirs trop loin; de ne pas dépasser à l'heure actuelle les possibilités réelles d'aujourd'hui. Bornons-nous donc à accepter le délai de 24 heures proposé par la Délégation des Pays-Bas. Laissons à demain l'œuvre de demain en exprimant seulement un vœu pour l'avenir d'un délai plus grand, plus bienfaisant. (Deuxième Conférence Internationale de la Paix, Tome I, p. 133.)

The discussions in the Conference resulted in agreement upon the following:

Art. 1. The Contracting Powers recognize that hostilities between them must not commence without a previous and unequivocal notice which shall have either the form of a declaration of war with reasons or an ultimatum with a conditional declaration of war.

Thus there was established a rule requiring a declaration of war previous to the opening of hostilities, but not fixing the time which should elapse between the decla-

ration and the opening of operations. It was, however, argued that neutrals should not be held responsible until notified of the existence of war.

The report of the committee particularly concerned with the drafting of this Convention said:

D'après l'article 2 de la proposition de la Délégation française, "l'état de guerre devra être notifié sans retard aux Puissances neutres." En effet, la guerre ne modifie pas seulement les rapports entre les belligérants, elle influe gravement sur la situation des Etats neutres et de leurs ressortissants; il importe dès lors qu'ils soient prévenus le plus tôt possible. Aujourd'hui, avec la divulgation rapide des nouvelles, il n'est guère à supposer que l'on tarde beaucoup à connaître dans le monde entier l'existence d'une guerre ayant éclaté sur un point quelconque du globe et qu'un Etat puisse invoquer son ignorance de l'état de guerre pour se soustraire à toute responsabilité. Mais, enfin, il peut arriver que, malgré les télégraphes terrestres ou sous-marins et la radiotélégraphie, la nouvelle ne parvienne pas d'elle-même aux intéressés; il y a donc des précautions à prendre. D'une part, la Délégation de Belgique avait proposé l'amendement suivant: "*L'état de guerre devra être notifié aux Puissances neutres. Cette notification, qui pourra être faite même par voie télégraphique, ne produira effet à leur égard que 48 heures après sa réception.*" (*Vol. III, Deux. Com., Annexe 21.*) D'autre part, la Délégation britannique, dans un article faisant partie d'une proposition soumise à la Troisième Commission et renvoyé à votre Sous-Commission, disait: "*Un Etat neutre n'est tenu de prendre des mesures pour préserver sa neutralité que lorsqu'il aura reçu d'un des belligérants un avis du commencement de la guerre.*" (*Vol. III, Trois. Com., Annexe 44.*)

L'amendement belge, qui n'avait en vue que de mettre les Etats neutres en mesure de remplir leurs obligations, mais qui, pris à la lettre, aurait pu être interprété autrement, a été modifié; même sous sa forme nouvelle, il n'a pas obtenu l'approbation de la Commission.

L'opinion qui a prévalu est qu'il n'y avait pas lieu de fixer de délai. L'idée maîtresse est très simple. Un Etat ne peut être tenu de remplir les devoirs de la neutralité que lorsqu'il connaît l'état de guerre qui fait précisément naître ces devoirs. Dès qu'il en est informé, peu importe par quel moyen, pourvu qu'il n'y ait aucun doute à cet égard, il ne peut rien faire de contraire à la neutralité. Est-il en même temps tenu d'empêcher les actes contraires à la neutralité qui pourraient être commis sur son territoire? L'obligation suppose la possibilité de la remplir. Ce que l'on peut demander au Gouvernement neutre, c'est de prendre sans retard les mesures nécessaires. Le délai dans lequel les mesures pourront être prises variera naturellement suivant les circonstances, l'étendue du territoire, la facilité des communications. Le délai de 48 heures qui était proposé pourrait être, selon les cas, trop long ou trop court. Il n'y a pas a établir de présomption légale de

responsabilité ou d'irresponsabilité. C'est une question de fait qui le plus souvent sera résolue assez aisément.

La Sous-Commission s'est donc bornée à adopter la rédaction suivante:

"*L'état de guerre devra être notifié sans retard aux puissances neutres et ne produira effet à leur égard qu'après réception d'une notification qui pourra être faite même par voie télégraphique.*"

Au Comité d'Examen, on a fait remarquer que la règle ainsi posée est trop absolue, puisqu'elle supposerait qu'un Gouvernement neutre, qui, par suite de telle ou telle circonstance, n'aurait pas reçu la notification prévue, mais qui cependant aurait, sans doute aucun, connu l'état de guerre, peut se dégager de toute responsabilité à raison de ses actes, en se fondant simplement sur l'absence de notification. L'essentiel n'est-il pas qu'un Gouvernement connaisse l'état de guerre pour prendre les mesures nécessaires? La preuve est facile dans le cas d'une notification; s'il n'y a pas eu de notification, le belligérant qui se plaint d'une violation de neutralité doit prouver nettement que l'état de guerre était certainement connu dans le pays où se sont passés les actes incriminés.

Après discussion, la majorité du Comité a décidé d'ajouter la phrase suivante:

"*Il est du reste entendu que les Puissances neutres ne pourraient invoquer l'absence de notification s'il était établi d'une manière non douteuse qu'en fait elles connaissaient l'état de guerre.*"

Ce texte, accepté par la Commission, semble tenir suffisamment compte des intérêts en présence. (Ibid., p. 134.)

With the substitution of the word "Toutefois" for the clause "Il est du reste entendu que" this formula was adopted by the Conference.

Report of American delegation.—The American delegates to the Second Hague Conference, in reporting to the Secretary of State, said, regarding the Convention Relative to the Opening of Hostilities:

The convention is very short, and is based upon the principle that neither belligerent should be taken by surprise, and that the neutral shall not be bound to the performance of neutral duties until it has received notification, even if only by telegram, of the outbreak of war. The means of notification is considered unimportant, for if the neutral knows, through whatever means or whatever channels, of the existence of war, it can not claim a formal notification from the belligerents before being taxed with neutral obligations. While the importance of the convention to prospective belligerents may be open to doubt, it is clear that it does safeguard in a very high degree the rights of neutrals, and specifies authoritatively the exact moment when the duty of neutrality begins. It is for this reason that the American delegation supported the project and signed the convention. (60th Congress, 1st Sess., S. Doc. 444, p. 34.)

Commencement of hostilities after declaration.—It is recognized by this Hague Convention "that hostilities between Contracting Powers must not commence without previous and unequivocal notice." The period of time which must elapse is not prescribed, and the proposition to make it at least 24 hours was not accepted. Therefore, in strict conformity with the law of this Convention, the declaration could be made at as short a time previous to the opening of hostilities as suited the convenience of the belligerent.

It is also evident that this Convention is operative only among States which have become parties to it. (Before 1910 this Convention had been signed by all the States represented at The Hague in 1907, except China and Nicaragua.) The Convention being binding between States only is not necessarily applicable in time of civil war or similar hostilities.

Prof. Westlake maintains that under certain circumstances the commencement of hostilities without a preceding declaration "is left possible by the fact that the parties are not made to contract that they will not commence hostilities against one another otherwise than is described, but recognize that hostilities ought not (*ne doivent pas*) to be otherwise commenced." (International Law, Pt. II, War, p. 267.) If this interpretation of the French is admitted, it is evident that the purpose of the Convention was, as the preamble says, to prevent the "commencement of hostilities without previous notice." It would seem, however, if the Convention has been signed in good faith, as must be acknowledged, *ne doivent pas* becomes obligatory and lays a prohibition on the Contracting Powers to refrain from commencement of hostilities till after notice or declaration.

A much more difficult question arises when it is asked what constitutes the commencement of hostilities. It is an undoubted fact that the first shot fired by order of the State might be regarded as the opening of hostilities; similarly, a proclamation of blockade or other like act of the State might be so regarded. The Constitution of the United States provides that Congress shall have power "to declare war." (Art. I, sec. 8, 11.)

In case of an ultimatum, with a conditional declaration of war, the conditional provision gains importance.

Commencement of Spanish-American War.—In 1899 Mr. Chief Justice Fuller said of the Spanish merchant steamer *Pedro:*

When, on the 22d day of April, this Spanish steamer sailed from Havana, the United States and Spain were at war. Congress had adopted a resolution, April 20, demanding "that the Government of Spain at once relinquish its authority and government in the island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters," and directing and empowering the President "to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States, to such extent as may be necessary to carry these resolutions into effect." Time was given by the Executive until April 23 for Spain to signify compliance with the demand, but the Spanish Government at once, on April 21, recognized the resolution as "an evident declaration of war," and diplomatic relations were broken off. Blockade had been proclaimed April 22, and put into effective operation at Havana, and, immediately thereupon, elsewhere, under the proclamation. And by the act of Congress of April 25 it was declared that war had existed since the 21st day of April. (The *Pedro*, 175 U. S. Supreme Court Reports, p. 354.)

This was in accord with the general opinion in regard to the relation of declaration of war to the opening of hostilities as summarized by Prof. Moore in 1906.

It is universally admitted that a formal declaration is not necessary to constitute a state of war. From this principle, however, an unnecessary and perhaps unwarranted inference is often drawn, namely, that a nation may lawfully or properly begin a war at any time and under any circumstances, with or without notice, in its own absolute discretion. Such a theory would seem to be altogether inadmissible. Although a contest by force between nations may, no matter how it may have been begun, constitute a state of war, it by no means follows that nations, in precipitating such a condition of things, are not bound by any principles of honor or good faith. If, for example, a nation, wishing to absorb another, or to seize a part of its territory, should, without warning or prior controversy, suddenly attack it, a state of war would undoubtedly follow, but it could not be said that the principles of honor and good faith enjoined by the law of nations had not been violated. In other words, to admit that a state of war exists is by no means to justify the mode by which it was brought about or begun. Nor is the practice of fraud and deceit permitted by a state of war supposed to be admissible in time of peace. (7 Moore, Internatinal Law Digest, p. 171.)

Commencement of Russo-Japanese War.—During the Russo-Japanese War in 1904 the question arose as to what action really constituted the opening of hostilities. In the case of the Russian steamship *Argun* which was captured on the 7th of February, 1904, at about 4 p. m., and condemned by the Sasebo Prize Court the plea was entered that the capture was made before the opening of hostilities as follows:

(1) It is a rule in international law that the state of war begins with the opening of actual hostilities. The ship under consideration was captured on the day before the sea fight off Port Arthur; that is, before the opening of actual hostilities. She ought, therefore, to be released. (Takahashi, International Law Applied to the Russo-Japanese War, p. 574.)

Other pleas were also entered against the legality of the capture.

After due consideration the Court concludes as follows:

When diplomatic negotiations concerning the Manchurian and Korean questions were going on between Japan and Russia, the latter country unreasonably failed to give her answer to Japan. On the other hand, she showed great activity in her army and navy, sent her land forces to Manchuria and Korea, collected her war vessels at Port Arthur, and thus showed her determination to fight. This fact was clear.

Whereupon Japan, on the 5th of the second month of the thirty-seventh year of Meiji, notified Russia that all diplomatic relations were at an end.

At the same time Japan made preparations for action and the next day, the 6th, at 7 a. m., her fleet left Sasebo with the object of attacking the Russian fleet. Inferring from the conduct of the navies of both countries and from the state of things at the time, hostile operations were publicly opened prior to the capture of the steamship now under consideration. And as it is thus clear that a state of war had begun before the time of the ship's capture, there is no need to discuss whether it was made before the declaration of war or not. (Ibid., p. 575.)

On protest against the decision of this Court, the Higher Prize Court at Tokyo sustained the decision of the prize court of first instance. The decision of the Higher Prize Court is explained as follows:

In (1) of the protest the advocate argues that the state of war commences with the opening of actual hostilities, and as hostilities actually opened between Japan and Russia on the 8th of the second month of the thirty-seventh year of Meiji, the ship ought not be confiscated. But the commencement of the state of war does not necessarily lie at

the moment when two armed forces open fire upon each other, but rather at the time when the intention of making war is made public; that is to say, at the time when such intention is carried into effect, or when by a declaration of war or otherwise any such notification is made. And as the intention of making war had been publicly announced on the 6th of the second month of the thirty-seventh year of Meiji, before the battle was fought at Port Arthur on the 8th, the state of war already existed on the 7th; and the argument of the advocate that the war commenced on the 8th has no ground. (Ibid., p. 577.)

In referring to the capture of the Russian Volunteer Fleet Company's steamship *Ekaterinoslav* which was made about 9 o'clock on the morning of February 6, 1904, the Higher Prize Court said in regard to the protest against the decision of the lower court:

The state of war does not necessarily begin at the moment when the two opposing armed forces open fire upon each other, but rather when the intention of making war is made public; that is to say, when the intention is carried into action, or when a dcelaration of war or any such notification is made. When diplomatic negotiations were going on between Japan and Russia concerning the independence and territorial integrity of China and Korea, the Russian unreasonableness put an amicable settlement beyond hope. And when it became very clear that Russia intended to force Japan to submission by force of arms, the Japanese Government ordered its diplomatic agent at St. Petersburg on the 5th day of the 2d month of the 37th year of Meiji to notify the Russian Government that diplomatic relations between the two countries were at an end. At the same time the imperial fleet made preparations for war and left Sasebo the next day, the 6th, at 7 a. m., with the object of opening hostilities. On the way the fleet captured the ship under consideration, which was liable to naval service in time of war. This (i. e., the sailing of the fleet) was nothing more than putting the intention into action, and the Russo-Japanese War must be said to have been opened from that moment. Thus the state of war existed on the 6th day of the 2d month of the 37th year of Meiji; that is, the day on which the Japanese man-of-war *Saiyen* captured the ship under consideration. (Ibid., p. 590.)

If this case had arisen subsequent to the agreement upon the Hague Convention of 1907 relative to the Commencement of Hostilities, in which "the Contracting Powers recognize that hostilities between them must not commence without a previous and unequivocal notice," the declaration should have preceded the departure of the fleet from Sasebo at 7 a. m. on the morning of February 6, 1904.

If the sailing of a fleet "with the object of opening hostilities" constitutes a state of war, there may be consequences of far-reaching significance to naval powers in this Hague Convention. If the Russo-Japanese troubles had been deferred till 1908 and a Russian fleet had sailed from St. Petersburg with the intention of attacking the Japanese fleet at Sasebo, would it have been necessary in order that Russia might not be accused of bad faith that the Russian authorities should have made a previous declaration of war, thus giving to Japan the advantage of weeks of preparation?

If the sailing of the Russian fleet, as above, constituted a state of war, Russia, by Article 2 of the Hague Convention would have been under obligation to notify "neutral Powers without delay;" otherwise such Powers might be subject to the necessity of proving that they were unaware of the state of war.

After considering cases Prof. Takahashi says, "On the whole, the author's view is that the Russo-Japanese war was commenced by the capture of the *Ekaterinoslav,* as she was liable to be appropriated for naval service during the war." (Ibid, p. 25.)

While the Convention relative to the Opening of Hostilities would probably give rise to few, if any, questions in case of war on land, it would seem necessary to determine what constitutes the commencement of hostilities upon the sea in order that the contracting powers may not be accused of bad faith.

Application of principles to Situation II.—In spite of the previous ultimatum of the United States, it would seem that the United States could consider that a state of war exists between July 7 and 10.

This situation is not expressly covered by the Hague Convention Relative to the Opening of Hostilities.

There is, however, nothing in international law which prevents State X from issuing a subsequent ultimatum to take effect at a date earlier than that named by the United States.

Since State X has then the power of declaring war against the United States before July 10, it could hardly

be consistently argued that the United States has tied its own hands from all offensive or defensive warfare until July 10, if war is declared by X before that date.

Reasons of fairness and of necessity demand that we find by implication in the United States ultimatum an intention of postponing war till July 10, *if X does not sooner declare war against the United States.* If X declares war prior to the 10th, then for the purposes of the United States war dates from this prior date.

This same result is practically reached by Dr. Stowell when he says in discussing an interval before the opening of hostilities—

> When one State declares war against another, giving an interval before the opening of hostilities, it goes without saying that the State against which war is declared may in turn declare war at once, or it may allow a shorter interval before the commencing of hostilities. But what if it make no rejoinder—may it begin hostilities at the expiration of the interval? Yes; because if attacked it would certainly defend itself, and the measures of defense necessary to its security must in some instances go to the extent of attacking the declaring State. (American Journal of Int. Law, vol. 2, No. 1, p. 56.)

Effect of the declarations of the United States and State X.—Considering the Hague Convention of 1907 as operative unless there is evidence or a statement to the contrary, these declarations by the United States and State X may be considered to be made under the provisions of the Convention relative to the Opening of Hostilities.

In accordance with the ultimatum of the United States war would exist from July 10 unless certain demands are satisfied before that date. These demands are not satisfied; therefore there would be no doubt as to the existence of war from July 10.

State X announces that war will be declared on July 7 unless the United States withdraws its demands before that date.

These acts of the United States and State X may properly be regarded as ultimatums with conditional declarations of war conforming to the requirements of the Hague convention.

In order that war may exist by declaration it is not necessary that both parties should make declaration.

War may exist by declaration on one side. State X has announced that it would make such a declaration for July 7 if the United States did not take certain action. This action the United States did not take. No statement is made as to whether State X did, as it announced it would do, declare war on July 7. However, in the absence of any withdrawal of the demand, it would be legitimate for the United States to consider the action of State X as a declaration of war and to regard a state of war as existing from July 7 in accord with the announcement of State X.

Attitude of the commander.—The commander of the United States war vessel knows only that the demands of neither the United States nor of State X have been modified. He may accordingly regard a state of war as existing between the United States and State X from July 7. It would be only in accord with proper interpretation of the statement of State X to accept July 7 as the date of the beginning of the war. For the commander, therefore, war between the United States and State X would exist on July 8, when he meets the merchant vessel of State Y loaded with coal and bound for a port of State X. He would first have to consider what is the status of the coal under the conditions and then must consider what is the status of the vessel under the conditions.

Status of the merchant vessel if sailing with knowledge of war.—If the merchant vessel had sailed with knowledge of the existence of war between the United States and State X she would be liable to capture by the war vessel of the United States as bound to a hostile destination with a cargo which under the conditions would presumably be contraband. The evidence would certainly be sufficient to justify the commander in sending the vessel to a prize court. In forming his decision to take such action, he could be reasonably certain that he could act without making his State liable to damages if the merchant vessel knew of the existence of war.

Status of the merchant vessel if sailing without knowledge of the war.—If the merchant vessel had sailed before July 1 and had no knowledge of the prospect of hostilities, the

vessel could not have sailed for a belligerent destination, as at that time the port of State X was not the port of a belligerent. Accordingly the cargo would not at the beginning of the voyage be contraband, but in the highest degree innocent.

If the vessel had sailed after July 1 and before July 7 with a knowledge of the strained relations and of the action of one or of both the States, it might be without guilty intent, for the strained relations might not result in war, as both declarations were conditional. The mechant vessel of a neutral State Y could not be presumed to know whether or not the conditions had been met. Until July 7 the destination would be peaceful and cargo innocent. If war existed from that date the destination might be belligerent, and the question would arise as to whether the cargo would be liable, as it would in case it had been shipped for a belligerent destination. A neutral ship is entitled to knowledge of the existence of blockade before incurring any penalty. It would seem that a neutral vessel would similarly be entitled to know of the existence of war before she would be liable for the carriage of contraband and before the articles of the nature of contraband could be condemned as contraband. The commander should therefore exercise more caution in sending in such a vessel. It will also be expedient to have regard to treaty provisions in respect to the treatment of contraband. Such provisions as Article 10 of the treaty of the United States with Sweden of April 3, 1783, might apply.

ART. 10. These which follow shall not be reckoned in the number of prohibited goods—that is to say, all sorts of cloths and all other manufactures of wool, flax, silk, cotton, or any other materials, all kinds of wearing apparel, together with the things of which they are commonly made; gold, silver, coined or uncoined, brass, iron, lead, copper, latten, coals, wheat, barley, and all sorts of corn or pulse, tobacco, all kinds of spices, salted and smoked flesh, salted fish, cheese, butter, beer, oyl, wines, sugar, all sorts of salt and provisions which serve for the nourishment and sustenance of man; all kinds of cotton, hemp, flax, tar, pitch, ropes, cables, sails, sailcloth, anchors, and any parts of anchors, ship masts, planks, boards, beams, and all sorts of trees and other things proper for building or repairing ships. Nor shall any goods be considered as contraband which have not been worked into the

form of any instrument or thing for the purpose of war by land or by sea, much less such as have been prepared or wrought up for any other use. All which shall be reckoned free goods, as likewise all other, which are not comprehended and particularly mentioned in the foregoing article; so that they shall not, by any pretended interpretation, be comprehended among prohibited or contraband goods. On the contrary, they may be freely transported by the subjects of the King and of the United States, even to places belonging to an enemy, such places only excepted as are besieged, blocked, or invested, and those places only shall be considered as such which are nearly surrounded by one of the belligerent powers.

This treaty also contains in Article 15 a statement in regard to the liability of commanding officers—

And that more effectual care may be taken for the security of the two contracting parties, that they suffer no prejudice by the men of war of the other party or by privateers, all captains and commanders of ships of His Swedish Majesty and of the United States and all their subjects shall be forbidden to do any injury or damage to those of the other party, and if they act to the contrary, having been found guilty on examination by their proper judges they shall be bound to make satisfaction for all damages and the interest thereof and to make them good under pain and obligation of their persons and goods.

Notification to neutrals of the existence of war.—There is a provision in the Hague Convention of 1907 relative to the Opening of Hostilities to the effect that—

The existence of a state of war must be notified to the neutral Powers without delay, and shall not take effect in regard to them until after the receipt of a notification, which may, however, be given by tele graph. Neutral Powers, nevertheless, can not rely on the absence of notification if it is clearly established that they were in fact aware of the existence of a state of war.

Prof. Moore cites a report of the Argentine Supreme Court:

In February, 1865, a British subject shipped from Liverpool to his agent in Buenos Ayres a quantity of rifles, with a view to their sale in Paraguay. After the arrival of the goods at Buenos Ayres such a sale was negotiated, and the rifles were shipped from Buenos Ayres on April 8, 1865, for Corrientes, Argentine Republic, where they were to be transshipped for Paraguay. On April 14 war broke out between the Argentine Republic and Paraguay, and the steamer on which the rifles were transported was stopped by the governor of Corrientes, who took out the rifles and placed them at the disposal of the Argentine Government. The owner subsequently presented a claim for the value of the rifles, as well as for an indemnity of about a fourth of their

value for their detention for 18 months. Their value he estimated by the price which they would have fetched in Paraguay. A suit was brought in the federal court at Buenos Ayres, which held that the rifles could not be lawfully confiscated, and that they should be returned to the owner or that a just equivalent should be paid to him or his representative. From this decision the Argentine Government appealed to the supreme court, which decided that, as the arms were shipped by the owner before the declaration of war, they were not subject to confiscation; that their taking by the Argentine Republic was to be considered as an act of expropriation for public use, and not as an act of preëmption under the law of nations; that according to the law of expropriation the price to be paid was what the goods were worth in place where they were taken; and that, as the Government had in detaining the arms exercised a legitimate right, from which no obligation to pay indemnity could arise, the Government should pay only the current rate of interest on the value of the arms from the date of their expropriation. (7 Moore Int. Law Digest, p. 747.)

Résumé.—From the conditions and regarding principles and international conventions and agreements and such precedents as may be applicable, it would seem that the merchant vessel of neutral State Y loaded with coal should be treated with caution if she had sailed without knowledge of the existence of war, as might easily be the case if she was met on July 8, as stated in the situation. According to the precedent from the Argentine court the goods seized under such circumstances would be liable to expropriation rather than condemnation as prize.

SOLUTION.

Unless exempt by treaty or otherwise the commander should send the merchant vessel of State Y to a prize court on the ground that the cargo was contraband of war if the vessel sailed with knowledge of the existence of the war.

If the vessel clearly had no knowledge of the existence of the war, he should consider that the cargo will probably be liable to expropriation rather than condemnation.

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Situation III.

DAYS OF GRACE.

States X and Y are at war. The war has broken out suddenly. State X proclaims that it will allow to vessels of State Y within the ports of State X 48 hours in which to load and depart. State Y protests that this is not a reasonable *délai de faveur*, and that as State Y has allowed 14 days for vessels of State X to depart, the vessels of State Y should be allowed a longer period than 48 hours, and also states that if a longer period is not allowed the 14-day period will be reduced.

(*a*) Is 48 hours a reasonable period?

(*b*) Has State Y the right to shorten the period already proclaimed?

(*c*) Has State Y the right to withdraw all *délai de faveur?*

SOLUTION.

(*a*) Under certain circumstances 48 hours may be a reasonable limit for *délai de faveur.*

(*b*) State Y, if it deems such action expedient, should be allowed to shorten the period which it has already proclaimed to correspond with the period granted by State X.

(*c*) Under the conditions proposed in Situation III and having regard to the preamble of the Hague Convention on this subject, State Y has not the right to withdraw all *délai de faveur*, though in an extreme case it may adopt the alternative of the Convention which requires enemy vessels to depart "immediately."

NOTES.

Early provisions for days of grace.—Provision was made for days of grace in the treaty of Utrecht between Great Britain and France in 1713.

Art. 27. On the contrary, it is agreed that whatever shall be found to be laden by the subjects and inhabitants of either party, in any ship belonging to the enemy of the other, and his subjects, the

whole, although it be not of the sort of prohibited goods, may be confiscated, in the same manner as if it belonged to the enemy himself; except those goods and merchandises as were put on board such ship before the declaration of war, or even after such declaration, if so be it were done within the time and limits following; that is to say, if they were put on board such ship, in any port and place within the space of six weeks after such declaration, within the bounds called The Naze in Norway, and The Soundings; of two months, from The Soundings to the city of Gibraltar; of ten weeks, in the Mediterranean Sea; and of eight months in any other country or place in the world; so that the goods of the subjects of either prince, whether they be of the nature of such as are prohibited, or otherwise, which, as is aforesaid, were put on board any ship belonging to an enemy before the war, or after the declaration of the same; within the time and limits abovesaid, shall no ways be liable to confiscation, but shall well and truly be restored without delay to the proprietors demanding the same; but so as that if the said merchandises be contraband, it shall not be any ways lawful to carry them afterwards to the ports belonging to the enemy. (1 Chalmers Collection of Treaties, p. 407.)

Discussion of 1906.—Topic III of the International Law Topics discussed by the Naval War College in 1906 was as follows:

What regulations should be made in regard to the treatment of vessels of one belligerent bound for or within the ports of the other belligerent at the outbreak of war?

The conclusion was stated in the following form:

1. Each State entering upon a war shall announce a date before which enemy vessels bound for or within its ports at the outbreak of war shall under ordinary conditions be allowed to enter, to discharge cargo, to load cargo, and to depart, without liability to capture while sailing directly to a permitted destination. If one belligerent State allows a shorter period than the other, the other State may, as a matter of right, reduce its period to correspond therewith.

2. Each belligerent State may make such regulations in regard to sojourn, conduct, cargo, destination, and movements after departure of the innocent enemy vessels as may be deemed necessary to protect its military interests.

3. A private vessel suitable for warlike use, belonging to one belligerent and bound for or within the port of the other belligerent at the outbreak of war, is liable to be detained unless the government of the vessel's flag makes a satisfactory agreement that it shall not be put to any warlike use, in which case it may be accorded the same treatment as innocent enemy vessels.

The notes upon this topic, discussed in 1906, show the early origin of some form of days of grace. The practice

as to time allowed enemy vessels to load and depart has varied. At the time of the Spanish-American war of 1898 the United States allowed 30 days, Spain allowed 5 days. At the time of the Russo-Japanese war in 1904, Russia allowed 48 hours and Japan allowed 10 days. Six weeks were allowed in some instances, as during the Crimean war, and the Austro-Prussian war of 1866.

While 6 weeks were allowed for enemy merchant vessels to load and depart in some of the wars of the latter half of the 19th century, only 30 days were allowed to Spanish vessels by the United States in 1898 and only 10 days by Japan to Russian vessels in 1904. The United States regulations of 1898 were held by the Supreme Court to grant exemption from capture to vessels that had sailed prior to the beginning of the war.

Opinion of Prof. Takahashi.—Prof. Takahashi says:

It may be stated with confidence that the days of grace of one week [1] were sufficient for Russian ships to enjoy the full benefits of exemption, considering the nature of marine traffic, commercial interest between Japan and Russia, as well as the position of the commercial ports in the Far East; consequently the one week's grace was adopted by the experienced experts of the Japanese Navy. (International Law Applied to the Russo-Japanese War, p. 66.)

Propositions as to délai de faveur at the Second Hague Conference.—There were made at the Second Hague Conference various propositions in regard to the treatment of merchant vessels of one belligerent in the ports of the other belligerent at the outbreak of hostilities.

Russia:

Dans le cas où un bâtiment de commerce d'un des belligérants serait surpris par la guerre dans un port d'un autre belligérant, celui-ci doit accorder à ce bâtiment un délai suffisant afin de lui permettre:

D'achever son déchargement, ou le chargement des marchandises qui ne constituent pas de contrebande de guerre et de quitter librement le port et de gagner en sécurité le port le plus rapproché de son pays d'origine ou un port neutre.

Netherlands:

Le délai sera fixé pour chaque port par les belligérants au commencement de la guerre; il ne pourra être de moins que de cinq jours.

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[1] Seven days were allowed after the date of the ordinance, ten from the beginning of the war.

This proposition was further elaborated:

Les navires de commerce ressortissant aux Puissances belligérantes, qui, à l'ouverture des hostilités, se trouveraient dans les ports ennemis, pourront, à moins que leur chargement ne constitue de la contrebande de guerre, quitter librement le port et gagner en sécurité le port national le plus rapproché ou un port neutre interposé.

Afin de leur permettre d'achever leur chargement ou leur déchargement, un délai suffisant, à fixer par les autorités locales, leur sera accordé.

France:

Les navires de commerce ressortissant aux Puissances belligérantes qui à l'ouverture des hostilités se trouveraient dans les ports ennemis, et auxquels aucun délai de faveur ne serait accordé pour reprendre la mer, ne peuvent être confisqués.

Toutefois la sortie du port peut leur être refusée et ils sont alors sujets à réquisition, moyennant indemnité, conformément aux lois territoriales en vigueur.

Sweden:

Dans le cas où un bâtiment de commerce d'un des belligérants serait surpris par la guerre dans un port d'un autre belligérant, il est désirable que celui-ci accorde à ce bâtiment un délai de faveur afin de lui permettre:

D'achever son déchargement, ou le chargement des marchandises qui ne constituent pas de contrebande de guerre et de quitter librement le port et de gagner en sécurité le port le plus rapproché de son pays d'origine ou un port neutre.

Discussion of délai de faveur at the Second Hague Conference.—The *questionnaire* submitted by Prof. Martens to the Second Hague Conference in 1907 contained the following:

IV. Est-il de bonne guerre, au moment de l'ouverture des hostilités, de saisir et de confisquer les navires marchands ennemis stationnés dans les ports de l'un des Etats belligérants?

V. Ne faut-il pas reconnaître à ces navires le droit de quitter librement, dans un laps de temps déterminé, avec ou sans cargaison, les ports de leur séjour au moment du commencement de la guerre? (Deuxième Conférence Internationale de la Paix, Tome. III, p. 1133.)

The Russian opinion upon the general question of *délai de faveur* was in part:

La pratique et la science ont établi la procédure suivante, qui est en usage depuis la guerre de Crimée. Un délai de faveur suffisant doit être accordé aux navires de commerce des belligérants, pris à

l'improviste par la déclaration de guerre dans un port ennemi. Ce délai doit être assez long pour permettre au navire d'achever son déchargement ou le chargement des marchandises qui ne constituent pas de contrebande de guerre, de quitter librement le port et de gagner, avec toutes les garanties de sécurité, le port le plus rapproché de son pays d'origine, ou n'importe quel autre port neutre.

De même ne peuvent être ni capturés, ni confisqués à titre de prises, les navires de commerce de la nation ennemie, qui ont quitté un port quelconque avant la déclaration de guerre, et qui ignorent le commencement des hostilités, l'ouverture de celles-ci ayant eu lieu lorsqu'ils se trouvaient en pleine mer. (Ibid., p. 825.)

The instructions given June 12, 1907, to the British delegation to the Second Hague Conference state:

It has been customary on the outbreak of hostilities for belligerents to grant certain days of grace to enemy and neutral ships. In the view of His Majesty's Government the allowance of such an interval before the strict rules of hostilities are enforced should, as indeed the term "days of grace" implies, be treated purely as a matter of grace and favor, and not as one of right, and they are of opinion that any fixed rule on the point would be undesirable, as the circumstances of each case must necessarily differ. It will be to the general interest of this country to maintain the utmost liberty of action in this particular. (Correspondence, Second Peace Conference, Parliamentary Papers, Misc. No. 1 (1908), p. 16.)

The British position was thus stated:

Heureusement à l'heure actuelle il est d'usage d'accorder un tel délai aux navires de commerce, mais cet usage n'existe que depuis un certain nombre d'années. Il y a de plus le fait incontestable que la durée de ce délai, accordé aux vaisseaux ennemis et neutres, varie d'une façon considerable selon les circonstances.

Pendant plus d'une *cinquantaine* d'années la Grande-Bretagne a toujours accordé ce délai aux navires de commerce dans les cas où elle se trouvait belligérante. En outre elle continuera toujours dans cette voie, à condition seulement que les opérations militaires n'en soient pas lésées d'une façon sérieuse.

Il est évident, cependant, que ce délai est accordé par *faveur* et qu'il n'y existe aucun *droit*, et de notre manière de voir il ne serait jamais possible de formuler une loi internationale qui exigerait d'une Puissance belligérante qu'elle accorde un délai de faveur à l'ouverture d'une guerre *sans aucune réserve*.

De ce que vient de dire l'honorable Délégué qui a parlé en dernier lieu, il nous paraît évident qu'il serait *impossible* de formuler une règle absolue qui donnerait pleine satisfaction à *tout le monde* en *toutes circonstances*.

Un délai d'une telle durée qui satisferait les marines marchandes de deux Puissances voisines, serait tout à fait insuffisant dans le cas

où les Puissances belligérantes se trouveraient dans de différents hémisphères.

On doit encore envisager le cas d'une Puissance possédant des colonies dans les mers lointaines. Un délai de quelques jours qui pourra suffire pour les vaisseaux de commerce se trouvant dans ses ports métropolitains, ne serait nullement suffisant pour ceux qui se trouveraient dans les ports coloniaux.

De plus, et laissant de côté la question géographique, il y a encore un argument non moins fort qui nous porte à demander que la limite du délai ne soit pas fixée d'une façon absolue.

On peut imaginer le cas d'une guerre entre deux Puissances, l'une possédant une marine marchande très grande, et l'autre n'ayant pas d'intérêt important dans le commerce sur mer.

La première fera son possible afin de prolonger la durée du délai, la seconde, au contraire, voudra commencer aussitôt que possible ses opérations contre la marine marchande de son ennemi.

Voilà quelques facteurs du problème qui nous est soumis. Pendant que ces différences existent, et pendant que le droit de capture et de blocus sont de règle, il nous paraît raisonnable que chaque Puissance se réserve le droit d'agir à ce sujet selon ses intérêts comme dans le passé.

Néanmoins, nous estimons qu'un belligérant ne doit pas seulement donner avis d'un blocus, mais qu'il doit en outre accorder aux vaisseaux neutres un délai convenable avant d'exercer ses pleins pouvoirs contre eux.

Le Gouvernement britannique juge qu'il sera mieux de ne pas établir des règles fixes qui pourront limiter les droits d'un belligérant à cet égard, ce qui n'implique nullement qu'on ne devra pas accorder les délais de faveur comme règle générale.

Bien au contraire, mon Gouvernement a pleine intention d'adhérer à ce qu'il a fait dans le passé depuis plus de cinquante ans.

Dans le cas (qui j'espère n'arrivera jamais) où la Grande-Bretagne serait belligérante, elle accorderait aux vaisseaux marchands, tant ennemis que neutres, un délai de faveur convenable, sous réserve toujours que ce délai ne puisse compromettre ses intérêts nationaux.

En un mot, le Gouvernement de la Grande-Bretagne s'associe aux sentiments qui ont motivé la proposition russe, mais en même temps nous sommes d'opinion que le délai doit être considéré accordé comme un privilège et nullement comme un droit. (Ibid., p. 827.)

The Japanese delegate said:

Quoique le Japon ait toujours accordé un délai de faveur à tous les navires et dans tous les ports, la Délégation japonaise estime néanmoins qu'a l'avenir il n'y aurait pas de raisons suffisantes pour traiter les navires des belligérants qui, en temps de paix, sont subsidiés par le Gouvernement pour être transformés en instruments de guerre offensive, autrement que comme de contrebande mentionnés dans la proposition des honorables Délégués de Russie. Nous pensons aussi

que la Puissance belligérante doit avoir le droit de prendre les dispositions nécessaires pour indiquer les ports où le privilège en question sera accordé, ainsi que les limites de la faveur qu'elle a l'intention de donner, de façon qu'elle puisse accorder aux intéressés plus de facilités dans un port que dans un autre. Nous estimons ensuite que, des stipulations conventionnelles seront établies à ce sujet, il est préférable de fixer un délai bien déterminé que d'indiquer un délai dépendant de la durée du chargement et du déchargement de la cargaison, ce qui semble être un terme équivoque, puisque dans quelques ports ces opérations peuvent être achevées dans deux ou trois jours et, dans d'autres, elles peuvent durer des semaines et mêmes des mois.

En conséquence, tout en acceptant le principe humanitaire qui est énoncé dans la proposition de la Délégation russe, nous nous rangeons en même temps à l'opinion de nos honorables collègues de la Grande-Bretagne en l'interprétant comme un privilège accordé par la Puissance belligérante, et non comme un droit qui pourrait être invoqué par le vaisseau en question. (Ibid., p. 828.)

The course of the discussion is shown in the résumé given in the report of the fourth commission, which from its significance may be stated fully:

La troisième question inscrite au programme de la Quatrième Commission est celle du "*dèlai de faveur à accorder aux vaisseaux pour quitter les ports neutres ou les ports ennemis après l'ouverture des hostilites.*"

C'est, comme on le sait, depuis la guerre de Crimée en 1854 que les Etats belligérants ont pris l'habitude, au début des hostilités, au lieu de confisquer les navires ennemis se trouvant ou entrant dans leurs ports, de leur permettre la sortie et même de leur accorder un certain délai pour sortir en sécurité.

Le motif de cette mesure, actuellement toute facultative, est de "concilier les intérêts du commerce avec les nécessités de la guerre" et, même après l'ouverture des hostilités "de protéger encore, aussi largement que possible, les opérations engagées de bonne foi et en cours d'exécution avant la guerre."

Cette question a été soumise à l'examen de la Commission par notre Président, M. de Martens, sous la forme suivante:

"Est-il de bonne guerre, au moment de l'ouverture des hostilités, de saisir et de confisquer les navires marchands ennemis stationnés dans les ports de l'un des Etats belligérants?"

"Ne faut-il pas reconnaître à ces navires le droit de quitter librement, dans un laps de temps déterminé, avec ou sans cargaison, les ports de leur séjour au moment du commencement de la guerre?"

Quatre propositions ont été déposées sur ce sujet:

La Délégation de Russie a proposé de déclarer désormais obligatoire la concession d'un délai aux bâtiments de commerce relevant d'une des Puissances belligérantes et surpris par la guerre dans les ports ennemis, afin de leur permettre d'achever leurs opérations commerciales inoffensives et de prendre librement la mer pour gagner en sécu-

rité leur port national le plus rapproché ou un port neutre. Le navire qui, par suite de force majeure, n'aurait pu profiter de cette faculté, ne pourrait être confisqué. La proposition russe ajoutait, par un motif analogue, que le navire ayant quitté son dernier port de départ avant la guerre et surpris en mer par le commencement de la guerre, ne pourrait être capturé, qu'il pourrait seulement être retenu et enfin que la faveur de ces dispositions devait être étendue également aux navires entrant dans les ports ennemis.

À l'appui de cette proposition, la Délégation Impériale a fait valoir d'une part la nécessité de sauvegarder, conformément à l'équité, les opérations de commerce engagées de bonne foi et en toute confiance avant la guerre et d'autre part la pratique universellement suivie depuis 1854.

Quelque équitable qu'apparaisse le principe même de cette mesure, on n'a pas manquée toutefois de faire remarquer combien une règle uniformément obligatoire était pratiquement délicate à fixer et comment la consécration d'une obligation pourrait éventuellement léser l'intérêt légitime des belligérants.

Les navires ennemis, qui se trouvent dans les ports d'un belligérant, peuvent, comme on l'a dit, être des navires susceptibles de servir à la guerre; il est difficile, peut-être impossible, de toujours les distinguer d'avance; peut-on alors obliger le belligérant à laisser, dans tous les cas, sortir de ses ports les navires de commerce ennemis, quels qu'ils soient, alors que la faculté de les retenir lui permet de priver son adversaire de moyens d'attaque et de défense pouvant bientôt être utilisés?

Pour ces raisons, la Délégation française a proposé le maintien du régime facultatif actuel. Mais, s'associant pleinement aux sentiments d'équité exposés par la Russie, et au légitime souci des intérêts du commerce international, exigeant de ne point tromper la confiance du trafic engagé en temps de paix, la Délégation de la République admettait que le navire auquel la sortie serait refusée ne saurait être confisqué et qu'il serait seulement sujet à réquisition, moyennant indemnité, comme toutes autres propriétés se trouvant sur le territoire du belligérant.

La Délégation néerlandaise, tout en se déclarant partisan de l'obligation, proposa un amendement tendant à y apporter une exception pour les navires susceptibles d'être transformés en bâtiments de guerre.

Enfin la Délégation suédoise, dans un but de conciliation, proposa de combiner les propositions russe et française, en se bornant à consacrer le caractère désirable de la concession d'un délai.

La discussion qui a eu lieu au sein de la Commission a ainsi principalement porté sur le caractère obligatoire ou facultatif de la mesure en question.

Après avoir constaté qu'il y avait unanimité pour considérer la concession d'un délai tout au moins comme désirable, la Commission a décidé de ne voter qu'après le travail du Comité d'Examen et elle a pensé qu'en vue de faciliter un accord, il convenait de charger ce Comité de rédiger un projet prenant en considération la préoccupation

relative aux navires de commerce susceptibles d'être transformés en bâtiments de guerre.

C'est dans ces conditions que le Comité d'Examen a procédé à ses délibérations.

L'accord n'ayant pu se faire sur le principe de l'obligation, le Comité a pris comme base de discussion la proposition transactionnelle suédoise, qui a abouti à un projet de règlement, dont voici l'économie, et qui, sauf certaines réserves, a obtenu, devant la Commission, l'unanimité moins deux abstentions. (Deuxième Conférence Internationale de la Paix, Tome I, p. 250.)

As a result of discussion there was elaborated by the drafting committee the following rule:

Lorsqu'un navire de commerce relevant d'une des Puissances belligérantes se trouve au début des hostilités dans un port ennemi, il est désirable qu'il lui soit permis de sortir librement, immédiatement ou après un délai suffisant, et de gagner directement, après avoir été muni d'un laisser-passer, son port de destination ou tel autre port qui lui sera désigné.

Il en est de même du navire ayant quitté son dernier port de départ avant le commencement de la guerre et entrant dans un port ennemi dans l'ignorance des hostilités.

The word *désirable* is used to indicate the degree of obligation resting upon the belligerent, as Great Britain at the Conference was particularly opposed to making the grant of delay a duty of the belligerent.

The British delegation proposed the insertion of the words *de faveur* after the word *délai*. (For the several propositions see Deuxième Conférence Internationale de la Paix, Tome III, pp. 1150–1154.)

Thus there was evolved at the Second Hague Conference in 1907 a rule less stringent than the practice which had been recognized by the United States as generally obligatory.

The Convention relative to the Status of Enemy Merchant Ships at the Outbreak of Hostilities according to the introductory clause was agreed upon by States "anxious to insure the security of international commerce against the surprises of war and wishing, in accordance with modern practice, to protect as far as possible operations undertaken in good faith and in process of being carried out before the outbreak of hostilities."

Report of the American delegation.—The report of the American delegation emphasized the grounds upon which the attitude of the United States was maintained.

The uninterrupted practice of belligerent powers since the outbreak of the Crimean war has been to allow enemy merchant vessels *in their ports at the outbreak of hostilities* to depart on their return voyages. The same privilege has been accorded to enemy merchant vessels which sailed before the outbreak of hostilities, to enter and depart from a belligerent port without molestation on the homeward voyage. It was therefore the view of the American delegation that the privilege had acquired such international force as to place it in the category of obligations. Such, indeed, was the view of a majority of the Conference, but as the delegation of Great Britain adhered to the opinion that such free entry and departure was a matter of grace, or favor, and not one of strict right, the articles regard it as a delay by way of favor and refer to the practice as *desirable*.

In support of the American view the case of the *Buena Ventura* is in point. This case was decided in 1899, and in his opinion Justice Peckham says:

"It being plain that merchant vessels of the enemy carrying on innocent commercial enterprises at the time or just prior to the time when hostilities between the two countries broke out would, in accordance with the later practice of civilized nations, be the subject of liberal treatment by the Executive, it is necessary when his proclamation has been issued, which lays down rules for treatment of merchant vessels, to put upon the words used therein the most liberal and extensive interpretation of which they are capable; and where there are two or more interpretations which possibly might be put upon the language the one that will be most favorable to the belligerent party, in whose favor the proclamation is issued, ought to be adopted.

"This is the doctrine of the English courts, as exemplified in *The Phœnix* (Spink's Prize Cases, 1, 5) and *The Argo* (Id., p. 52). It is the doctrine which this court believes to be proper and correct. *The Buena Ventura* (175 U. S., 388)."

At the first reading, the Convention seems to confer a privilege upon enemy ships at the outbreak of war. Free entry and departure are provided for, ships are not to be molested on their return voyages, and a general immunity from capture is granted to vessels from their last port of departure, whether hostile or neutral. But all these immunities are conditioned upon ignorance of the existence of hostilities on the part of the ship. This condition forms no part of the existing practice, and it was the opinion of the delegation that it substantially neutralized the apparent benefits of the treaty and puts merchant shipping in a much less favorable situation than is accorded to it by the international practice of the last fifty years.

An enemy merchant vessel approaching a hostile port which is notified by an armed cruiser, or which obtains the information under

circumstances calculated to charge it with knowledge of the fact that hostilities exist, forfeits the immunities conferred by the treaty and becomes, *eo instante*, liable to capture. As the freight trade of the world is carried on in steamers which habitually carry only enough coal to reach their destination, the operation of the treaty is to render them instantly liable to capture, the alternative being to continue to the hostile destination and surrender.

The Convention operates powerfully in favor of a State having a predominant naval force and possessed of numerous ports throughout the world so situated that a merchant vessel carrying its flag may take refuge in such ports on being notified that hostilities exist. All other powers would be placed in a position of great disadvantage, and their merchant marine would suffer incalculable injury as the result of its adoption.

The effects upon the practice of marine insurance are also important. The ordinary contract does not cover a war risk. The operation of a war risk is simple because its conditions and incidents are fully known. But a policy calculated to cover the contingency of capture, the risk depending upon the chance or possibility of notification, would introduce an element of uncertainty into marine risks which, in view of the interests at stake, should not be encouraged.

The Convention also presents an undesirable alternative in the treatment of enemy merchant ships, in that it provides that in certain cases they may be seized "subject to restoration after the war without indemnity," or to "immediate requisition with indemnity." As merchant marine commerce is carried on it is obvious that the condition of the cargo which is detained in indifferent or inefficient custodianship during the ordinary duration of war would approach confiscation. It would also be substantially impossible to make such a risk the subject of a practicable contract of insurance.

The foregoing Convention was not signed by the delegation, and its acceptance as a conventional obligation is not recommended. (S. Doc. No. 444, 60th Cong., 1st sess., p. 38.)

This Hague Convention, relative to the Status of Enemy Merchant Ships at the Outbreak of Hostilities has not been adhered to by the United States.

Summary.—Whether 48 hours is a reasonable period to allow to belligerent merchant vessels to load and depart will depend upon many circumstances. The relative distance of the enemy ports from one another, the nature of the commerce between the ports, the character of the vessels, strategic reasons, and other circumstances may influence a state in determining the number of days of grace.

The discussion at The Hague in 1907 showed that the States were not willing to bind themselves to any fixed period of delay to be allowed to merchant vessels in an enemy port and that the rule as adopted did not determine even that any period should be allowed, though it is asserted that it is desirable that a sufficient period be granted.

Prof. Higgins says of the rule of the Hague Conference relating to the days of grace:

> The practice of granting of days of grace remains therefore as it was before the Conference. The powers have recognized its *desirability*, but no merchant ship can demand it, nor will there be a legal ground of complaint if all enemy merchant ships within a belligerent's ports at the outbreak of war are ordered to leave immediately or after a "sufficient" period. Whether the expression "It is desirable" will be considered as equivalent to a command remains to be seen. States will probably act in the future as they have acted in the past. Capt. Ottley stated that the British Government had every intention of adhering to the practice which it had observed during the past 50 years in granting days of grace, subject always to the reservation that the time allowed should not compromise its national interests. It was doubtless with a similar mental reservation that the other powers accepted this article. States will in the future as in the past consult their own interests in this matter, but their interests may not infrequently involve a consideration for the interests of neutrals. Each State will determine for itself whether the desire to injure its enemy by detaining his merchant ships, which might be of the greatest value as auxiliary ships for the fleet, will "prevail over the fear of offending neutrals by causing a great dislocation of trade in which some of them are sure to be interested." (The Hague Peace Conferences, p. 303.)

Conclusions (*a*) It would seem from the current rules and opinion that 48 hours might under certain circumstances be a sufficient period and under present rules State X could properly limit the *délai de faveur* to a period of 48 hours.

(*b*) As the allowance of days of grace is a favor rather than obligatory under present rules, a favor may be withdrawn. Certainly a favor granted by one belligerent to the other ought not to be taken advantage of to the detriment of the belligerent granting the favor. In the situation under consideration State Y should certainly be allowed to shorten the period already proclaimed to

correspond with that granted by State X to the vessels of State Y.

(*c*) To withdraw all *délai de faveur* would involve the good faith of Y, as the vessels of State X had doubtless governed their action by the proclamation of State Y. To compel departure within 48 hours would be a hardship, but would still allow the vessels to depart and would be an adequate measure to meet the action of State X in limiting the *délai de faveur* to 48 hours and could be justified on the ground of retaliation.

To withdraw all *délai de faveur* after once announcing that *délai* would be allowed would closely approach perfidy, which is generally regarded as prohibited in war.

While it would be possible for a State to refrain from the grant of any specific *délai de faveur*, it would not be justifiable for a State to proclaim a *délai* and later withdraw all *délai*.

State Y has not the right under the conditions stated to withdraw all *délai de faveur*, but may in an extreme case allow the vessels to depart freely but "immediately."

SOLUTION.

(*a*) Under certain circumstances 48 hours may be a reasonable limit for *délai de faveur*.

(*b*) State Y, if it deems such action expedient, should be allowed to shorten the period which it has already proclaimed to correspond with the period granted by State X.

(*c*) Under the conditions proposed in Situation III, and having regard to the preamble of the Hague Convention on this subject, State Y has not the right to withdraw all *délai de faveur*, though in an extreme case it may adopt the alternative of the Convention, which requires enemy vessels to depart "immediately."

Situation IV.

PURSUIT OF NEUTRAL BLOCKADE RUNNER.

(In this Situation it is granted that the Declaration of London is binding.)

There is war between the United States and State X. Great Britain is neutral. The *Moon*, a British merchant vessel, which has sailed from London with a cargo for port C of State X, before which the United States is maintaining an effective blockade, passes the blockading ships in the night and enters port C. When attempting to return the *Moon* is pursued by a cruiser of the blockading squadron. The *Moon* runs into a neutral port, D, near the blockaded port. The cruiser waits outside the three-mile limit. When the *Moon* comes out of port three days later, the cruiser captures her. The master of the *Moon* protests that the capture is not valid and that the pursuit was at an end when he entered the neutral port.

Is the master's protest valid? What should be done?

SOLUTION.

The pursuit by the cruiser was not abandoned. The protest of the master of the *Moon* is not valid. The captain of the cruiser should send the *Moon* into port for adjudication as prize. If for any reason she should be released by the court, the action of the captain could be justified.

NOTES.

Duration of penalty.—Kleen discusses the grounds of difference of the offense of carriage of contraband and of violation of blockade and argues for a difference in duration of penalty.

C'est ce caractère purement local qui distingue essentiellement les violations de blocus d'avec les autres transgressions de la neutralité. Dans un fait de contrebande, par exemple, le transport est délictueux n'importe où se trouve l'ennemi qui est le but final et à quelle distance de cet ennemi que soient les objets prohibés qui lui sont destinés.

Déjà l'acte de les apporter peut être poursuivi, à une étape quelconque dans le cours du voyage, alors que la destination interdite peut être démontrée comme telle; cela, parce que la signification du secours n'est pas attachée à telle ou telle localité, et que le secours lui-même ne consiste pas dans quelque obstacle mis à une opération liée intimement à une place. Au contraire, le blocus est une telle opération. Inséparable des lieux de son objet, ce n'est que là qu'il peut être violé. (1 La Neutralité, p. 630.)

Kleen maintains that—

Un navire pris en flagrant délit de violation de blocus peut être saisi par la force bloquante et traduit devant le tribunal de prises pour être puni selon le paragraphe suivant.

Aucun acte n'est réprimable en dehors de la place et du moment du fait délictueux.

Un navire ne peut être saisi à moins d'être pris pendant son entrée même au port bloqué, ou dans le port, ou bien à son retour de celui-ci avant d'avoir atteint, soit un port ou une eau neutres, soit—sans être poursuivi—la haute mer ou le port non bloqué d'un belligérant. Toutefois, une poursuite commencée sur les lieux du blocus peut être continuée dans la haute mer et dans les eaux des belligérants, si elle est une et non interrompue. (Ibid., p. 636.)

* * * * *

Aussi ces publicistes s'accordent-ils à reconnaître que, de même qu'un blocus ne peut être violé que sur ses lieux et qu'il ne peut pas l'être par le voyage, de même la violation ne peut être poursuivie qu'en flagrant délit, ni avant ni après. Avant, aucune mesure quelconque ne peut légalement être prise contre le navire suspect; et après, aucune mesure ne peut être prise autre que celles qui sont motivées par des circonstances et qui sont censées propres à prolonger la phase du fait, à savoir les saisies, soit dans le port même, soit sur la place à la sortie de là, soit enfin sur la haute mer et dans les eaux des belligérants à la seule condition que la poursuite ait commencé au moment du fait et sur la place, et que sa continuation aux dits lieux n'ait pas été interrompue mais puisse être considérée comme une simple suite de l'action dirigée contre le délit pris sur le fait. Au contraire, un navire déjà échappé dont l'action interdite n'a pas été empêchée ni attaquée sur la place du blocus, et qui n'a pas non plus été poursuivi immédiatement, ne peut pas être attaqué après coup et ailleurs, fût-ce pendant le même voyage. Et, une fois dans les ports ou les eaux neutres, il est pour toujours hors de portée de toute poursuite, indépendamment de la fin du voyage. (Ibid., p. 639.)

Other opinions are given in the Naval War College International Law Situations, 1908, pages 21–26. Under the situation there considered the precedents and attitude of various States are presented. From that discus-

sion it is evident that by American and British practice prior to 1908 the *Moon* would be liable to capture when coming out of neutral port D and before returning to her port of sailing, London.

Differences in doctrine.—Prof. Westlake, writing in 1907, mentions the difference between the Anglo-American and the continental views and says:

The time during which a vessel which has broken a blockade by egress, whether she was in the port at the commencement of the blockade or had entered that port by a successful breach of it, may be captured with condemnation as the result, is subject to a difference between the Anglo-American and the continental schools analogous to that which we have seen to exist as to the commencement of the liability for a breach by ingress. Those who hold that a blockade can only be maintained by a stationary squadron restrict to that squadron the right of vindicating a breach of it. A ship of that squadron may pursue the blockade runner who has succeeded in passing its line to any distance compatible with the maintenance of the blockade by the remainder of the force, but when he has once entered a neutral port the affair is closed and he is free. Those who hold that a blockade may be maintained by cruisers allow any ship of war, whether she has or not been a member of the blockading squadron, to capture the offender at any distance from the blockaded port until his destined voyage is ended, supposing always that the blockade is really in existence at the time of the capture. In the opinion of that school the blockade runner has not got rid of his culpability, deposited it as the phrase is, by entering a neutral port not that of his destination in order to escape pursuit or under stress of weather. On his leaving it the chase can be renewed or taken up by some other ship. (International Law, Part II, Peace, p. 234).

Dupuis states the British position in its extreme form:

Un forceur de blocus sortant du port ne peut être pris, d'après les doctrines françaises, que par un navire de l'escadre de blocus; il ne peut être pris qu'au moment où il essaie de franchir les lignes, où, s'il réussit à les traverser, au cours d'une poursuite commencée sur le champ, achevée avec succès en haute mer.

Les Anglais considèrent que le voyage entier, depuis le port bloqué jusqu'au port de destination, constitue une infraction ininterrompue aux devoirs de la neutralité, une violation flagrante et continue du blocus. D'où il suit que tout croiseur belligérant a qualité pour exercer le *droit de suite*, c'est-à-dire pour opérer la capture du navire forceur de blocus, en quelque point qu'il le rencontre; il n'est pas besoin, pour le prendre sur le fait, que le capteur appartienne à l'escadre de blocus; quel que soit son emploi, il peut et doit réprimer l'acte

hostile qui se poursuit devant lui et qui ne prendra fin qu'à l'arrivée au port de destination.

Que faut-il entendre par le port de destination? La question est de grande importance; les Anglais la résolvent d'une manière rigoureuse. Le port de destination sera habituellement le port désigné dans la charte-partie comme le point final du voyage, sans qu'il y ait lieu de tenir compte des ports intermédiaires où le vaisseau pourrait relâcher, soit pour prendre ou laisser quelque cargaison, soit pour chercher un abri contre le nauvais temps; à plus forte raison, ne reconnaîtrait-on point la qualité de port de destination au port où la poursuite ou la crainte de l'ennemi engagerait le navire à demander un refuge. Cette solution rigoureuse est d'ailleurs la conséquence logique de la conception anglaise du blocus; puisque le blocus interdit toute communication, tout voyage maritime des lieux bloqués à un port quelconque, l'infraction se mesure au mépris de cette interdiction; elle comprend donc tout le trajet qu'on se propose jusqu'au dernier port où doivent être déchargées les marchandises prises aux lieux bloqués. (La Guerre Maritime et los Doctrines Anglaises, p. 220.)

The French contention has been that the vessel violating a blockade by egress could be taken only in *flagrant délit*. As Pradier-Fodéré says:

Si l'escadre de blocus n'a pu arrêter le navire coupable de violation, elle peut détacher un des vaisseaux qui la composent pour *poursuivre à vue* ce navire, et ce dernier ne sera valablement saisi que s'il est atteint par le vaisseau détaché de l'escadre bloquante avant d'être entré dans un port de son pays, où dans un port neutre, car le droit de prise ne peut s'exercer dans les eaux neutres, et une fois entré dans un port de son pays, ou dans des eaux neutres, s'il en ressort il ne peut plus être question de flagrant délit. Les navires forceurs de blocus ne peuvent être capturés que par les bâtiments de l'escadre bloquante. D'après la doctrine française, en un mot, s'il agit de violation de blocus *par entrée*, le navire neutre qui viole un blocus *par entrée* au port bloqué ne peut être capturé que sur la ligne du blocus, ou sur poursuite commencée de la ligne du blocus, et terminée, avec succès, avant l'arrivée du navire poursuivi, dans un port de son pays ou dans les eaux territoriales d'un Etat neutre; s'il est question de violation *par sortie*, cette violation prend fin dès que les lignes ont été franchies avec succès. Celui qui viole un blocus *par sortie* ne peut être pris qu'au moment où il essaie de franchir les lignes d'investissement, ou au cours d'une poursuite commencée sur le champ et achevée avec succès en haute mer. Dans l'un et l'autre cas de violation la capture ne peut avoir lieu que par les navires de l'escadre de blocus. (8 Droit International Public, sec. 3143, pp. 425–426.)

Bluntschli maintains that a neutral vessel which has violated a blockade by egress may continue its voyage

without liability to capture after it has entered a neutral port. (Das moderne Völkerrecht, 836.) Other writers limit the right of capture to the waters under control of the blockading force or to the period of continuous pursuit on the high seas by a ship of the blockading force. (3 Hautefeuille, Des Droits et des Devoirs des Nations Neutres, p. 154; Heffter, Das Europäische Völkerrecht, 156; 2 Cauchy, Droit Maritime, p. 214; Calvo, Droit International § 1184; Gessner, Le Droit des Neutres sur Mer, pp. 228, 244.)

Ortolan, relying more upon the English precedents, says:

> Le délit résultant d'une violation du blocus subsiste généralement pendant tout le voyage, mais l'offence ne suit jamais le navire plus loin que le terme de son voyage de retour. Si le navire qui a commis cette violation est capturé avant la fin de ce voyage de retour, il est considéré comme pris en flagrant délit. (2 Diplomatie de la Mer, p. 354.)

British Commission on Supply of Food.—The questions of Sir Gerard Noel and the replies of Prof. Holland before the British Royal Commission on the Supply of Food and Raw Material in Time of War raise the problem of protection in neutral waters:

> 6799. Do you consider that one of our merchant ships would be actually safe from capture within the three-mile limit of a neutral coast?—I think that rule is one of the best established rules of international law; they differ in stringency, but I think that is as generally accepted as any of them.
>
> 6800. And that it would be carried out?—I think you might fairly rely upon it; accidents might occur, of course; there might be pursuit into those waters. That would be illegal, but that might accidentally occur, and would have to be apologized for afterwards. I do think the rule is one of the best established rules of international law.
>
> 6801. Then one of our merchant vessels passing through the Mediterranean, and remaining as much as possible in neutral waters, along the coast of Sicily and along the coast of Spain, and so on, would be free from capture by a French cruiser whilst in those waters?—Certainly.
>
> 6802. You think they would recognize that?—Yes, there would be a very strong public opinion of the world against any infringement of that. (Report, Vol. II, Minutes of Evidence, p. 237.)

Question of blockade at the Hague Conference.—In the proposition in regard to blockade submitted by Italy

and supported by the Brazilian, the Netherlands, the German and other delegations at the Second Hague Conference in 1907, Article 5 provides:

Un navire ne peut être saisi comme coupable de violation de blocus qu'au moment où il tente de franchir les lignes d'un blocus obligatoire. (Deuxième Conférence Internationale de la Paix, Tome III, p. 1167.)

The American delegation offered as a substitute for this Article the following:

Tout navire qui, après qu'un blocus a été dûment notifié, fait voile pour un port ou une place bloqués, ou qui essaie de forcer le blocus, peut être saisi pour violation de blocus. (Annexe 35, Ibid., p. 1168.)

The British delegation indorsed this substitute. (Ibid., p. 169.)

M. Fusinato of the Italian delegation, speaking upon Article 5, said:

L'article 5 contient la conséquence la plus importante de la notion du blocus, telle qu'elle est fixée par l'article I. Il établit qu'un navire ne pourra être saisi pour violation de blocus qu'au moment où il essaye de forcer la ligne d'un blocus obligatoire. La Délégation des Etats-Unis d'Amérique vient de présenter un amendement (*Annexe 35*) à cet article, qui en modifierait substantiellement la valeur. Il y a lieu toutefois d'espérer qu'on pourra s'accorder sur une base commune d'entente. Quant à nous, nous sommes d'avis que reconnaître l'effectivité du blocus comme la première condition de sa valeur obligatoire, revient à déclarer que le fondement et l'essence du blocus consiste entièrement dans l'exercice réel de la puissance militaire du belligérant sur la zône bloquée. Il s'en suit nécessairement que le blocus ne commence pas, tant que cette puissance militaire n'est pas établie, qu'il cesse, aussitôt qu'elle finit, et que son action et ses conséquences ne peuvent se réaliser là où elle n'existe pas réellement. En d'autres termes, le blocus n'est qu'une action de guerre, inséparable des lieux où elle s'exerce, et dont la violation ne saurait être effectuée et punie que sur ces lieux mêmes. (Ibid., p. 888.)

The discussion of the whole question of blockade at the Second Hague Conference showed so great a diversity of view between the continental and the Anglo-American doctrines in regard to blockade that it was decided to leave the subject of blockade to a subsequent conference of States. (Ibid., Tome I, p. 262.)

Propositions at the International Naval Conference, 1908–9.—Various propositions in regard to the dura-

tion of liability to capture of a vessel that had violated blockade were submitted to the International Naval Conference at London. The following is a brief statement of these propositions:

Germany:

La capture n'est permise qu'autant que le navire tente de franchir les lignes du blocus ou qu'il est poursuivi *in flagranti* par un bâtiment de la force bloquante. (Proceedings of the International Naval Conference, British Parliamentary Papers, Misc. No. 5 (1909), p. 88.)

United States:

The liability of a vessel purposing to evade a blockade, to capture and condemnation begins with her departure from the home port and lasts until her return, unless in the meantime the blockade of the port is raised.

Spain:

Le navire qui, après avoir forcé ou tenté de forcer le blocus et étant poursuivi par les vaisseaux bloquants, est perdu de vue par ceux-ci, ou réussit à gagner un port ouvert, devient libre. (Ibid., p. 88.)

France:

La violation d'un blocus régulièrement établi résulte aussi bien de la tentative de pénétrer dans les lieux bloqués que de celle d'en sortir après la déclaration du blocus, à moins que ce ne soit dans le délai de sortie accordé. La saisie des navires ne peut, en conséquence, être effectuée que dans le rayon d'action des bâtiments de guerre chargés d'assurer la réalité du blocus.

Le navire qui a traversé les lignes, mais qui reste poursuivi, est de bonne prise. Si la chasse en est abandonnée, la saisie n'en peut plus être pratiquée. (Ibid., p. 88.)

Great Britain:

Breach of blockade outward.—A vessel which has succeeded in coming out of a port in breach of blockade is liable to capture until the conclusion of the voyage, whether she has touched at an intermediate port or not.

After a blockade has come to an end, a vessel can not be seized for breach of it, either by ingress or egress, except in the case where the blockaded port is captured and a vessel found therein which has entered in breach of blockade. (Correspondence and Documents, International Naval Conference, British Parliamentary Papers, Misc. No. 4 (1909), p. 7.)

Italy:

Un navire qui tente de sortir du port bloqué peut être saisi même en dehors de la ligne du blocus, pourvu qu'il ait été poursuivi au moment

où il la franchissait, et rejoint avant qu'il n'ait pu toucher un port neutre. Si le navire a pu franchir sans difficulté et sans obstacles la ligne du blocus, il ne pourra plus être saisi, même s'il arrivait dans un port de la Puissance bloquante. (British Parliamentary Papers, Misc. No. 5 (1909), p. 90.)

Netherlands:

La violation du blocus a lieu au moment de la transgression de la ligne du blocus. Une poursuite pour violation de blocus pourra s'étendre au delà de la ligne du blocus, mais finira aussitôt que le navire aura atteint un port ouvert ou au moment antérieur de la levée du blocus. (Ibid., p. 90.)

Observations on place of seizure.—Having regard to the propositions of the ten States participating, the British Foreign Office prepared for the International Naval Conference preliminary bases of discussion, in order that the attention of the delegates might be focused upon what seemed the essential questions. The observations upon this subject were as follows:

Lieu de saisie.—Si l'on examine attentivement ce que la saisie a pour but de sanctionner, on ne peut nier que c'est assurément l'interdiction que proclame le blocus, c'est-à-dire, l'interdiction d'arriver au lieu bloqué. Si parfois, en raison de la disposition tactique de la force bloquante, on a pu considérer que celle-ci formait en fait comme une barrière ou ligne dont elle surveille l'accès, on ne saurait oublier qu'à proprement parler ce n'est pas le passage même de cette ligne qui est l'objet de cette interdiction, mais bien toujours l'arrivée au lieu bloqué.

D'autre part, il est depuis longtemps incontesté que la violation d'un blocus présuppose que le blocus est effectif, c'est-à-dire, que l'interdiction est réellement maintenue par une force suffisante pour en assurer le respect.

Partant de ces idées communes, les Gouvernements en ont séparément poursuivi l'application par des voies, à l'aide desquelles l'analyse doctrinale des auteurs a peu à peu échafaudé des systèmes, qui ont plus obscurci qu'écla irci les résultats pratiquement constatés.

En réalité, les navires condamnés pour violation de blocus sont capturés avant d'avoir accompli véritablement l'acte interdit, c'est-à-dire, avant d'avoir atteint le lieu bloqué, quelque rapprochés qu'ils en puissent être.

Ce qu'exige la saisie c'est que l'acte de violation soit manifestement caractérisé et que la sanction corresponde vraiment à l'infraction.

Ce n'est qu'au fur et à mesure que le navire s'approche du lieu bloqué que l'infraction se caractérise, jusqu'au moment où l'expédition destinée au port bloqué arrive dans le rayon d'action de la force bloquante et alors l'infraction devient manifeste, la saisie est justifiée.

Si ces considérations sont exactes, il semble que les vues exprimées dans les différents Mémorandums seraient avantageusement rapportées à leur origine commune, et pourront se rencontrer dans une formule également commune, énonçant ce qui est, en somme, le résultat pratique auquel elles paraissent toujours aboutir. (Ibid., p. 91.)

Basis of discussion at the International Naval Conference.—The basis of discussion was drawn up in the following form:

24. La saisie des navires neutres pour violation de blocus ne peut être effectuée que dans le rayon d'action des bâtiments de guerre chargés d'assurer la réalité du blocus.

25. Le navire qui, en violation du blocus, est sorti du port bloqué, reste saisissable tant qu'il est poursuivi. Si la chasse en est abandonnée, la saisie n'en peut plus être pratiquée. (Ibid., p. 91.)

The discussion.—The discussion of this form was accompanied by certain suggestions as to changes in the phraseology.

The Netherlands delegation proposed—

Si la chasse en est abandonnée, ou si le navire atteint un port neutre, ou bien si le blocus est levé, la saisie n'en peut plus être pratiquée. (Ibid., p. 244.)

Other propositions were also made and discussed, but the question of limit of distance of pursuit was overshadowed by that as to the limit of the area of operation of the blockading fleet.

The instructions to the British delegation referring to this matter were as follows:

There arises in this connection the question as to the limit of distance or time up to which the pursuit of a vessel that has broken blockade outwards may be continued. According to the British theory, the vessel would remain liable to pursuit and capture until she had reached the terminal point of her homeward voyage. The opposing school holds that the right to pursue and capture ceases when the pursuit has been abandoned. His Majesty's Government are advised that the acceptance of the latter view would not be likely to inflict any material injury on the interests of Great Britain. They therefore consider that it will not be necessary to insist on the rigorous adoption of the British principle on this point. (Correspondence and Documents, International Naval Conference, British Parliamentary Papers, Misc. No. 4 (1909), p. 26.)

Rule of the Declaration of London.—The International Naval Conference at length reached an agreement upon

many questions relating to blockade. The limit of pursuit was the subject of Article 20.

A vessel which in violation of blockade has left a blockaded port or has attempted to enter the port is liable to capture so long as she is pursued by a ship of the blockading force. If the pursuit is abandoned, or if the blockade is raised, her capture can no longer be effected.

Of this Article the General Report, which by the approval of the Conference became an official commentary upon the Declaration of London, says:

> A vessel has departed from the blockaded port or has tried to enter it. Shall she be indefinitely liable to capture? An absolutely affirmative reply would be too extreme. This vessel must remain liable to capture so long as she is pursued by a ship of the blockading force; it would not suffice that she be encountered by a cruiser of the blockading enemy which did not belong to the blockading squadron. The question whether or not the pursuit is abandoned is a question of fact; it does not suffice that the vessel should take refuge in a neutral port. The ship which is pursuing her can wait her departure, so that the pursuit is necessarily suspended, but not abandoned. Capture is no longer possible when the blockade has been raised. (Naval War College International Law Topics, 1909, p. 55.)

Application to Situation IV.—According to the statement of Situation *IV*, the *Moon* has broken the blockade regularly maintained, and when pursued by a ship of the blockading squadron, the *Moon* runs into a near-by neutral port though not the port from which she sailed. The voyage of the *Moon* is not therefore complete and the pursuit was continuous till the vessel entered neutral waters. In view of the fact that the action of the blockading force is by the Declaration of London confined to the "area of operation," the question of pursuit received special attention. The General Report of the International Naval Conference states under Article 20 of the Declaration of London, "The question whether or not the pursuit is abandoned is a question of fact; it does not suffice that the vessel should take refuge in a neutral port. The ship which is pursuing her can wait her departure, so that the pursuit is necessarily suspended, but not abandoned."

SOLUTION.

The pursuit by the cruiser was not abandoned. The protest of the master of the *Moon* is not valid. The captain of the cruiser should send the *Moon* into port for adjudication as prize. If for any reason she should be released by the court, the action of the captain could be justified.

Situation V.

INFLUENCE OF DESTINATION ON CONTRABAND CHARACTER.

(In this Situation it is granted that the Declaration of London is binding.)

There is war between Great Britain and European State X. Hostile operations are confined to the European Continent. State X has no ports in the Pacific Ocean, but one of her cruisers chances to be in the Pacific Ocean and overtakes an American merchant vessel loaded with coal consigned to, and of a kind commonly used by, the civil Government of New Zealand. The merchant vessel's papers are regular and she is on the proper course. The merchant vessel contends that she is exempt from capture. The commander of the cruiser maintains that the coal is conditional contraband.

Which is correct? What should be done?

SOLUTION.

The contention of the master is correct. The commander of the cruiser should allow the vessel to proceed.

NOTES.

Coal in time of war.—In the long period during which a list of contraband has been evolved the treatment of coal has varied. The decisions of courts and the opinions of text writers have likewise varied. Some writers have maintained that the treatment of coal in time of war should be determined by conventional agreement. (Galiani, De Doveri, 1, cap. IX, secs. 3–7.) Others with the desire to leave neutrals free in time of war have demanded that only articles of the nature of absolute contraband be liable to seizure.

The treaties of earlier days show how coal and other articles were regarded in conventional agreements. The Treaty of Utrecht, 1713, Article 20, shows the tendency to exempt many articles from the list of contraband. Coals are definitely exempted.

These merchandises which follow shall not be reckoned among prohibited goods; that is to say, all sorts of cloths, and all other manufactures woven of any wool, flax, silk, cotton, or any other materials whatever; all kinds of cloths and wearing apparel, together with the species whereof they are used to be made; gold and silver, as well coined as uncoined, tin, iron, lead, copper, brass, coals; as also wheat and barley, and any other kind of corn and pulse; tobacco, and likewise all manner of spices, salted and smoked flesh, salted fish, cheese and butter, beer, oils, wines, sugars, and all sorts of salt, and, in general, all provisions which serve for the nourishment of mankind and the sustenance of life. Furthermore, all kinds of cotton, hemp, flax, tar, pitch, ropes, cables, sails, sailcloths, anchors, and any parts of anchors; also ship masts, planks, boards, and beams, of what trees soever; and all other things proper either for building or repairing ships; and all other goods whatever, which have not been worked into the form of any instrument or thing prepared for war, by land or by sea, shall not be reputed contraband, much less such as have been already wrought and made up for any other use; all which shall wholly be reckoned among free goods, as likewise all other merchandises and things which are not comprehended and particularly mentioned in the preceding article, so that they may be transported and carried, in the freest manner, by the subjects of both confederates, even to places belonging to an enemy, such towns or places being only excepted as are at that time besieged, blocked up round about, or invested. (1 Chalmers, Treaties, p. 403.)

This treaty was frequently reaffirmed during the eighteenth century, and this clause occurs in other important treaties during the eighteenth century as in the treaties between the United States and France in 1778 (Art. 24), the United States and Sweden, 1783 (Art. 10), and Great Britain and France in 1786 (Art. 23).

Treaties of the earlier part of the nineteenth century in general made no mention of coal. Treaty provisions specifically excluding from capture articles not of the nature of absolute contraband are common during the first half of the nineteenth century. Some treaties forbid capture of goods not enumerated though actually bound to a seat of operations. The treaty of 1828 between the United States and Brazil (still in force) is an example of this practice:

ART. 17. All other merchandise and things not comprehended in the articles of contraband, expressly enumerated and classified as above, shall be held and considered as free, and subjects of free and lawful commerce, so that they may be carried and transported in the freest manner by both the contracting parties, even to places belonging to an

enemy, excepting only those places which are at that time besieged or blockaded; and, to avoid all doubt in this particular, it is declared that those places are only besieged or blockaded which are actually attacked by a force capable of preventing the entry of the neutral.

This clause was repeated in the treaty between the United States and Colombia in 1846 (Art. 18), and in the treaty with Bolivia in 1858 (Art. 17).

The article relating to this subject was somewhat modified in the treaty with Haiti in 1864, by omitting the last clause.

ART. 21. All other merchandises and things not comprehended in the articles of contraband explicitly enumerated and classified as above shall be held and considered as free, and subjects of free and lawful commerce, so that they be carried and transported in the freest manner by the citizens of both the contracting parties, even to places belonging to an enemy, excepting only those places which are at the time besieged or blockaded.

Coal as contraband.—In the days of sailing vessels, when the wind was the sole means of propelling ships at sea, articles of fuel were not thought of as potential contraband of war. Soon after the middle of the nineteenth century the treatment of fuel in time of war became a matter of growing importance.

Secretary Cass, writing to the United States Minister to France in 1859, said:

The discussion which at this time is going on respecting the military character of coal, and whether it is now excluded from general commerce as contraband of war is a striking illustration of the tendency to enlarge this power of prohibition and seizure and of the necessity of watching its exercise with unabated vigilance. Here is an article not exclusively nor even principally used in war, but which enters into general consumption in the arts of peace to which, indeed, it is now vitally necessary. It has become also important in commercial navigation. It is a product of nature with which some regions are bountifully supplied, while others are destitute of it, and its transportation, instead of meeting with impediments, should be aided and encouraged. The attempt to enable belligerent nations to prevent all trade in this most valuable accessory to mechanical power has no just claim for support in the law of nations; and the United States avow their determination to oppose it as far as their vessels are concerned. (Quoted in 7 Moore, International Law Digest, sec. 1252, p. 673.)

The attitude of the United States changed with the change of conditions. A considerable correspondence

was carried on between Secretary Seward and the British chargé d'affaires in 1862, which gives evidence of the drift of opinion. Mr. Seward says in part in a long letter of October 3, 1862:

On the 14th of April, 1862, before the act of Congress was passed, it had been reported to the President that anthracite coal was being shipped from some of the ports of the United States to southern ports within and to other southern ports without the United States for the purpose of supplying fuel to piratical vessels which were engaged in depredating on the national commerce on the high seas. The Secretary of the Treasury, therefore, by authority of the President, who is charged with the supreme duty of maintaining and executing the laws, issued to the collectors of the customs at New York and other ports the following instruction:

"Clear no vessel with anthracite coal for foreign ports nor for home ports south of Delaware Bay till otherwise instructed."

It was thereupon represented to the President that this order was unnecessarily stringent and severe upon general commerce, because it prohibited the exportation of coal to ports situated so far from the haunts and harbors of the pirates that the article would not bear the expense of transportation to such haunts and harbors, and thereupon the Secretary of the Treasury, by the President's authority, on the 18th of May issued a new instruction on the subject to the collectors of the customs, which was of the effect following:

"The instructions of the 14th ultimo, concerning the prohibition of the exportation of coals, are so far modified as to apply only to ports north of Cape St. Roque, on the eastern coast of South America, and west of the fifteenth degree of longitude east. Coal may be cleared to other foreign ports, as before, until further directed."

The subject of supplies of coal and other merchandise having, in the meantime, engaged the attention of Congress, with the result of the passage of the law before mentioned, the Secretary of the Treasury, on the 23d of May last, and as speedily as possible after the approval of the law, issued the following instruction to the collectors of the customs of the United States:

Until further instructed you will regard as contraband of war the following articles, viz: Cannon, mortars, firearms, pistols, bombs, grenades, firelocks, flints, matches, powder, saltpeter, balls, bullets, pikes, swords, sulphur, helmets or boarding caps, sword belts, saddles and bridles, always excepting the quantity of the said articles which may be necessary for the defense of the ship and of those who compose the crew, cartridge-bag material, percussion and other caps, clothing adapted for uniforms, rosin, sailcloth of all kinds, hemp and cordage material, ship lumber, tar and pitch, ardent spirits, military persons in the service of the enemy, dispatches of the enemy, and articles of like character with those specially enumerated.

You will also refuse clearances to all vessels which, whatever the ostensible destination, are believed by you, on satisfactory grounds, to be intended for ports or places in possession or under the control of insurgents against the United States, or that there is imminent danger that the goods, wares, or merchandise, of whatsoever description, will fall into the possession or under the control of such insurgents. And in all cases where, in your judgment, there is ground for apprehension that any goods, wares, or merchandise shipped at your port will be used in any way for the aid of the insurgents or the insurrection, you will require substantial security to be given that such goods, wares, or merchandise shall not in any way be used to give aid or comfort to such insurgents. You will be especially careful upon applications for clearances to require bonds with sufficient sureties for fulfilling faithfully all the conditions imposed by law or departmental regulations from shippers of the following articles to the ports opened, or to any other ports from which they may easily be and are probably intended to be reshipped in aid of the existing insurrection, namely, liquors of all kinds, coals, iron, lead, copper, tin, brass, telegraph instruments, wire, porous cups, platinum, sulphuric acid, zinc, and all other telegraph materials, marine engines, screw propellers, paddle wheels, cylinders, cranks, shafts, boilers, tubes for boilers, fire bars, and every article whatever which is, can, or may become applicable for the manufacture of marine machinery or for the armor of vessels. (Message and Diplomatic Correspondence, U. S., 1862, p. 302.)

In 1864 Mr. Dayton, the American representative at Paris, reported to Secretary Seward as follows:

[Mr. Dayton to Mr. Seward.]

PARIS, *May 16, 1864.*

No. 465.]

SIR: In a recent conference with M. Drouyn de l'Huys he complained seriously of your late action in refusing to the French navy a supply of coal bought by it in New York. He says France never has declared and never will declare coal contraband of war; that if the United States should do so, it would be a retrograde move, inasmuch as its traditional policy had always been in favor of neutrals and in limitation rather than in extension of the list of contraband. He hopes that we will not retrace our steps, but in this matter adhere to our past policy; that France has always gone with us, or we with her, on these questions of maritime law, and he does not think it for the interest of either country to part company; at least that was the inference from his language.

He informed me, further, that your opinion was understood to be favorable to letting the coal go to the French vessels, but difficulty was made by the Secretary of the Treasury. I told him, if this were so there might be some question connected with the revenue which had

interfered, but he thought otherwise, and said that it was made to rest purely upon the question, Is coal contraband of war? This is a question of deep interest to the French Government—deeper, perhaps, than to us, she having a large navy and *little coal*, while Great Britain and the United States have an abundance of the latter article.

He said, further, that if the United States should declare coal contraband of war, it would place France in a false position in reference to our country. That she, France, holding coal not to be contraband, would be compelled to supply it to our enemies in time of war, and to the Confederates, while denying it to us, because we denied it to them. That they would dislike much to be placed in a position indicating such apparent want of neutrality, yet that it would be inevitable if coal was declared by us contraband of war.

There is a good deal of sensitiveness manifested here on this point. M. Rouher, minister of state, referred to it, I observe, in his late speech in the Chamber of Deputies.

I am, sir, your obedient servant,

WM. L. DAYTON.

(Diplomatic Correspondence, U. S., 1864, Part 3, p. 84.)

Attitude of Peru in 1866.—In the war with Spain in 1866, Peru issued the following decree:

LIMA, *February 9, 1866.*

Mariano Ygnacio Prado, Provisional Supreme Chief of the Republic, considering:

That in the actual state of war in which the Republic finds itself with the Government of Spain, it is necessary to determine the conditions of certain articles which being of lawful commerce may be considered according to circumstances as contraband of war;

I decree:

Sole article. Coal and provisions will be considered contraband of war when one or other are destined for the use of Spanish ships of war.

The Secretary of State in the Foreign Office is ordered to fulfill this decree. (56 British Foreign and State Papers, p. 917.)

The Peruvian Instructions for the Guidance of the Commanders of Vessels of War, issued on February 10, 1866, after enumerating the articles of contraband generally mentioned, said, "Equally so are coals destined for the vessels of war of the enemy or his privateers, etc." (56 ibid., p. 914.)

Coal in the war between Spain and Chile, 1866.—During the war between Spain and Chile in 1866 there was a declaration by the Spanish admiral in regard to Chilean

coal. The following note was addressed by him to the dean of the consular corps at Valparaiso:

HEADQUARTERS OF THE SQUADRON OF HER CATHOLIC MAJESTY IN THE PACIFIC, FRIGATE NUMANCIA,
Valparaiso, January 29, 1866.

MY DEAR SIR: Inclosed is the declaration which, in reference to Chilean mineral coal and in the exercise of my rights as a belligerant, I have issued this day.

I beg your excellency, as the worthy dean of the consular corps resident in Valparaiso, to inform it thereof.

I avail myself of this occasion to offer to your excellency the assurances of my respect and to repeat that I am your most obedient servant.

CASTO MENDEZ NUNEZ,

The Consul General of Her Faithful Majesty in Valparaiso.

The commander-in-chief of the Spanish squadron in the Pacific—

Considering, That the vessels of war, both Peruvian and Chilean, provide themselves with coal from the mines of Chile for their hostile operations on this coast;

Considering, That the laws of war permit belligerents to take possession of everything employed by the enemy in hostile operations against them, in which category the said combustible is included, being, moreover, a product of the soil of that enemy;

Considering, That the belligerent is authorized to declare new articles contraband of war whenever by the circumstances of said war, they become, in the hands of the enemy, elements for the undertaking and carrying on of hostilities;

Considering, finally, That the Government of Chile has declared coal destined for Spanish vessels of war or privateers to be contraband;

I have resolved—

1. Mineral coal of the different mines of Chile is hereby declared contraband of war.

2. Neutral vessels, on board of which those of this squadron may find Chilean mineral coal, whatever be the port for which they are bound, shall remain subject to the provisions of the fourth article of the instructions of blockade, circulated in establishing that of the ports of this Republic.

3. The object of this declaration, circumscribed as it is to a special instance of the present war, is not to lay down any precedent whatever respecting the general principle that stone coal ought not to be considered as contraband of war.

4. This declaration, made by the commander-in-chief of the naval forces of Her Catholic Majesty in the Pacific, shall bear a temporary character until his Government shall decide as it may deem proper in regard thereto.

On board the frigate *Numancia*, in the Bay of Valparaiso, January 29, 1866.

CASTO MENDEZ NUNEZ.

(Diplomatic Correspondence, 1866, Pt. 2, p. 371).

To this note the consular representatives of twenty-one States sent the following joint reply:

The undersigned members of the consular corps, assembled at the consular general of His Faithful Majesty the King of Portugal, have made themselves aware of the contents of the note which his excellency, the commander-in-chief of the squadron of Her Catholic Majesty in the Pacific, was pleased to address to the dean of the consular corps of this city on the 29th of January last. In that note and the accompanying resolution, the commander-in-chief is pleased to set forth that he has declared the coal of the different mines of Chile to be contraband of war, and that consequently neutral vessels on board of which those of the squadron of Her Catholic Majesty may find this combustible, whatever be its port of destination, will be subject to the provisions of the fourth article of the blockade instructions.

It is not the intention of the undersigned to enter into a discussion either upon the greater or less right possessed by the commander-in-chief to make the said declaration, nor upon the considerations upon which it is founded, nor upon the consequences to be deduced therefrom and they leave to their respective Governments the reservation to discuss with that of his excellency the questions involved in the measure adopted.

The undersigned, in conformity with the principles contained in the protest which they presented to the predecessor of his excellency, under date of the 5th of October last, deeming it their unavoidable duty to assist and protect the commerce of their peoples and the free navigation of the vessels bearing the flag of their respective nations, whenever they are employed in lawful traffic, can not do otherwise than protest in the most formal manner, and make the Government of the commander-in-chief responsible for all damages that may be caused to their people in consequence of the said resolution relative to coal from the different mines of the Republic of Chile.

For this purpose the undersigned have likewise agreed that the present be drawn up in duplicate, one being addressed to the commander-in-chief of the squadron of Her Catholic Majesty in the Pacific, through Mr. George Lyon, consul general of His Faithful Majesty and dean of this consular corps, and the other of the same tenor filed in the consulate general of His Faithful Majesty the King of Portugal.

The undersigned, begging the commander-in-chief to be pleased to acknowledge the receipt of the present communication, have the honor to offer to his excellency the assurances of their high consideration and respect. (Ibid, p. 374.)

Destination as an element in contraband.—In determination as to the nature of contraband, questions in regard to the character, ownership, and destination of the goods and the nationality of the vessel arise. The simple carriage of goods of the nature of contraband is not in itself an offense making goods or vessel liable to penalty, "it is the hostile destination of the goods that renders them liable to penalty and the vessel liable to delay or other consequences according to circumstances." (Wilson and Tucker, International Law, 5th ed. p. 319.) "Hostile destination" is an essential element in determining the treatment of goods in time of war. Goods of the nature of absolute contraband in neutral vessels and bound in good faith for a neutral destination are exempt.

Views of States in 1908.—The memoranda submitted by the ten States represented at the International Naval Conference at London in 1908–9 afforded the common ground that "La destination de la marchandise décide de son caractère de contrebande." (Proceedings, International Naval Conference, British Parliamentary Papers, Miscellaneous No. 5 (1909) p. 70.)

In the memoranda submitted by Germany, United States, Spain, France, Great Britain, Italy, Japan, Netherlands, and Russia, a wide range of opinion in regard to destination is found.

The German memorandum proposed to put burdens upon the neutral by forbidding carriage of contraband under certain circumstances. The statement of the proposed regulations was as follows:

> Il est interdit aux navires neutres faisant route vers le territoire d'un belligérant ou vers un territoire occupé par lui ou vers sa force armée de transporter des articles de contrebande de guerre qui ne soient pas destinés à être débarqués dans un port intermédiaire neutre.
>
> Les papiers du bord font preuve complète de la route du navire ainsi que du lieu de déchargement de la cargaison, à moins que le navire ne soit rencontré ayant manifestement dévié de l'itinéraire indiqué par les papiers du bord et sans pouvoir justifier d'une cause suffisante de cette déviation.
>
> Sont considérés comme contrebande de guerre d'autres objets et matériaux pouvant servir à la guerre lorsqu'ils sont destinés aux forces

armées ou aux services de l'Etat d'un belliérangt et qu'ils ont été par une déclaration notifiée expressément qualifiés de contrebande de guerre. Ils sont compris sous le nom de contrebande relative.

Il y a présomption péremptoire de la destination visée à l'alinéa précédent, si l'envoi en question est adressé aux autorités d'un belligérant.

Cette destination est présumée, si l'envoi est adressé à un commerçant dont il est notoire qu'il fournit à un belligérant des objets et matériaux de cette nature. La même présomption s'applique dans le cas où l'envoi est à destination d'une place fortifiée d'un belligérant ou d'une autre place servant de base d'opérations ou de ravitaillement à ses forces armées, à moins qu'il ne s'agisse d'établir le caractère de contrebande des navires mêmes qui font route vers une de ces places. Les presomptions prévues au présent alinéa peuvent être détruites par la preuve contraire. (Ibid., p. 66.)

The United States suggested that articles of the nature of absolute contraband "destined for ports of the enemy or places occupied by his forces, are always contraband of war," while articles of the nature of conditional contraband would be contraband only "when actually and especially destined for the military or naval forces of the enemy."

Austria-Hungary, in the discussion of the notion of contraband, said:

D'après la doctrine généralement adoptée, la contrebande est caractérisée par le fait que le neutre, en transportant des objets propres à être employés dans la guerre, procure au destinataire un avantage sur son ennemi. À cet effet, les objets doivent tomber réellement entre ses mains. Le fait seul qu'ils sont dirigés vers l'adversaire ne suffit point pour leur imprimer le caractère hostile. Si la guerre n'a lieu que sur terre, le belligérant ne devrait donc pas confisquer de blindages ou de machines de marine; et si les objets transportés sont destinés à traverser seulement le territoire ennemi, l'entrave mise au transport ne serait guère justifiable. Peut-être dira-t-on que l'adversaire aurait à craindre, en ce cas, que l'ennemi ne s'en emparât pendant leur transit. Or, un sauf-conduit, délivré par les autorités du pays ennemi et produit par le neutre arrêté, écarterait cette crainte.

Il s'ensuite que, en vérité, il n'existe qu'une contrebande présumable (et non pas absolue), le transport de matériel de guerre créant uniquement la présomption que les articles en route vers l'ennemi seraient employés dans la guerre. On ne saurait done refuser aux neutres la preuve du contraire. (Ibid., p. 17.)

Spain, following the inclination to limit contraband to the single category of what is known as absolute contraband, proposed:

La contrebande étant réduite aux articles qui n'ont d'utilité que pour la guerre, le fait de leur envoi à une flotte ennemie ou à des points du territoire ennemi ou occupés par l'ennemi, constitue, par lui-même, une preuve de la condition illicite des marchandises. Si celles-ci, destinées immédiatement à un point ennemi, n'y vont qu'en transit et possèdent réellement une destination finale neutre, c'est le destinataire qui aura à le démontrer, moyennant avis préalable à l'autre belligérant et production d'un sauf-conduit délivré par l'ennemi dont le territoire doit être traversé par les marchandises.

Nonobstant le paragraphe précédent, pour que le droit du belligérant à réprimer la contrebande puisse commencer à s'exercer, il est nécessaire que le navire au bord duquel vont les marchandises se trouve en voyage direct vers la flotte ou le point ennemi. (Ibid., p. 67.)

France proposed to forbid carriage of contraband:

Le transport par les neutres de la contrebande de guerre à destination de l'ennemi est interdit.

Things of the nature of absolute contraband were regarded as contraband "lorsqu'ils sont destinés à l'ennemi." (Ibid., p. 29.)

Great Britain gave a somewhat full statement of the British position:

PRESUMPTION AS TO CONDITIONAL CONTRABAND.

There is a presumption that conditional contraband is on its way to assist in the operations of the enemy only if there is proof that its destination is for the naval or military forces of the enemy, or for some place of naval or military equipment in the occupation of the enemy, or if there has been fraudulent concealment or spoliation of papers.

DESTINATION.

The destination of the cargo is generally presumed to be that of the ship. Where the ship is to call at more than one port the presence on board of goods which are *bona fide* documented for discharge at a neutral port before the ship reaches an enemy port can not be made a ground for detention; but if there is no such documentary evidence that port which is least favorable to the neutral will be presumed to be the destination of such cargo as would be contraband if carried to that port. If it is proved that the contraband cargo has an ulterior hostile destination, different from that of the ship, to which such cargo is to be forwarded as part of a single mercantile transaction, the destination of the ship will not protect the cargo.

LIABILITY TO SEIZURE.

A ship carrying contraband as defined in section 1 may be seized at any moment throughout the whole course of her voyage so long as she is on the high seas or in belligerent waters. The liability to seizure is not affected by the fact that the vessel is intending to touch at some neutral port of call before reaching the hostile destination.

When the contraband goods have been discharged the liability to seizure is at an end. In exceptional cases it has been held that a ship which has carried contraband to the enemy on her outward voyage under circumstances aggravated by fraud and simulated papers is still liable to capture and condemnation on her return voyage. (Correspondence and Documents International Naval Conference, British Parliamentary Papers, Miscellaneous, Nov. 4 (1909), p. 4.)

Italy quoted from her domestic law and court decisions:

(*a*) II. 1. "Les navires neutres dirigés vers un pays ennemi dont la cargaison est formée, en totalité ou en partie, par des objets de contrebande de guerre, seront capturés et conduits dans un des ports de l'État, où le navire et les marchandises de contrebande seront confisqués, et les autres marchandises seront laissées à la disposition des propriétaires."

La disposition susdite a été interprétée et appliquée dans ce sens, que le caractère de contrebande de guerre dépend de la destination finale et intentionnelle de la cargaison, et non pas de la destination immédiate et matérielle du navire. Dans un cas particulier il a été jugé que la contrebande existe lorsque le navire est dirigé vers un port neutre afin d'y décharger les marchandises destinées à rejoindre par voie de terre le pays ennemi, particulièrement si le pays en question n'a aucun débouché sur la mer.—(*Comm. prises*, 8 décembre 1896, capture du "Doelwijk.") (British Parliamentary Papers, Miscellaneous, No. 5 (1909), p. 67.)

Japan made a full statement as to the nature of hostile destination:

I. La contrebande de guerre est classée en deux catégories générales:

(*a*) *Contrebande absolue.*—Les armes, les munitions et les autres articles et matériaux employés immédiatement et ordinairement dans un but militaire, lorsqu'ils sont destinés au territoire de l'ennemi ou à un lieu occupé par lui ou à ses forces militaires ou navales.

(*b*) *Contrebande conditionnelle.*—Les articles et matériaux autres que ceux ci-dessus décrits, et qui peuvent être employés dans un but militaire, lorsqu'ils sont destinés aux forces militaires ou navales de l'ennemi.

Les articles et matériaux ci-dessus mentionnés sont considérés comme destinés aux forces militaires ou navales de l'ennemi, lorsqu'ils sont destinés au territoire de l'ennemi et que, d'après les circonstances se

rattachant au lieu de destination, on peut les considérer comme devant servir à l'usage militaire de l'ennemi.

II. Lorsque le port de destination ou d'escale d'un navire est sur le territoire de l'ennemi ou est un lieu occupé par l'ennemi, ou lorsqu'il y a des raisons de croire que le navire va à la rencontre des forces militaires ou navales de l'ennemi, la destination du navire est réputée être hostile.

III. La destination du chargement est ordinairement déterminée par la destination du navire.

Les marchandises se trouvant à bord d'un navire sont présumées avoir une destination hostile, si la destination du navire est un lieu qui, géographiquement, ou d'après d'autres considérations, peut être regardé comme constituant la dernière étape dans le transport des marchandises, soit par transbordement, soit par transport terrestre, à une destination hostile. (Ibid., p. 68.)

The Netherlands statement was brief:

La notion de contrebande s'applique au transport en mer libre ou dans les eaux situées sous la juridiction des belligérants vers le territoire ennemi, des marchandises comprises dans la liste de contrebande absolue insérée dans le rapport de la 4e Commission de la Deuxième Conférence de la Paix. (Ibid., p. 68.)

The Russian propositions show that the discussions consequent upon the events of the Russo-Japanese war had emphasized the possibilities of complications if explicit rules should not be made:

I. 1. * * * Les objets de contrebande absolue sont sujets à confiscation, lorsqu'ils sont transportés à destination d'un pays ennemi, d'un territoire occupé par l'ennemi ou de forces armées de l'ennemi.

ART. 2. Le belligérant a, en outre, le droit, après notification préalable, d'interdire le transport d'autres objets susceptibles d'être utilisés pour la guerre par une armée ou une flotte, lorsque ces objets sont transportés à destination de forces armées de l'ennemi (contrebande de guerre relative). Ils sont sujets à confiscation, si les intéressés ne prouvent pas que les objets transportés ne sont pas destinés à être utilisés pour la guerre.

ART. 3. Sous le nom de transport destiné aux forces armées de l'ennemi est compris le transport de la contrebande de guerre à destination:

(*a*) De l'armée ou de la flotte de l'ennemi;

(*b*) D'un port militaire ou d'une place fortifiée de l'ennemi;

(*c*) D'un port occupé par l'ennemi;

(*d*) De tout autre port de l'ennemi, si les objets de contrebande sont transportés pour le Gouvernement ennemi ou pour ses fournisseurs.

ART. 4. La destination illicite dans le sens des articles 1, 2 et 3 est considérée comme établie, lorsque les objets de contrebande se trouvent à bord d'un navire:

(*a*) Qui se dirige directement vers un pays ennemi, un territoire occupé par l'ennemi ou vers les forces armées de l'ennemi;

(*b*) Qui, tout en déclarant faussement une destination neutre, se dirige en réalité vers un pays ennemi, un territoire occupé par l'ennemi ou vers les forces armées de l'ennemi;

(*c*) Dont la destination est en fait un port neutre, si les objets de contrebande qui se trouvent à bord sont destineés à être expédiés ultérieurement par mer dans un pays ennemi, un territoire occupé par l'ennemi ou à ses forces armées. (Ibid., p. 68.)

Bases of discussion at the International Naval Conference.—The above propositions were considered, and an attempt was made to deduce the elements upon which there was accord and to formulate bases which, as points of departure for discussion, would facilitate the work of the delegates.

All memoranda were in agreement upon certain principles, while the interpretation of other principles varied.

Comme le montre tous les Mémorandums, la simple destination hostile suffit pour la contrebande absolue, et en ce qui concerne la contrebande conditionnelle une destination spéciale militaire est nécessaire.

BASE DE DISCUSSION.

4. *La simple destination au pays ennemi, comme la destination aux forces armées de l'ennemi ou à un territoire occupé par l'ennemi, est suffisante pour rendre saisissables les articles de contrebande absolue.*

5. *Une destination spéciale aux forces armées de l'ennemi est nécessaire pour rendre saisissables les articles de contrebande conditionnelle.*

OBSERVATIONS.

En présence du développement des moyens de communication et des multiples ramifications du trafic maritime et terrestre l'expérience des dernières guerres maritimes a conduit à appliquer certaines présomptions de la destination spéciale militaire; mais il n'apparaît pas qu'aucune de ces présomptions ait eu un caractère absolu écartant toute preuve contraire comme on a pu proposer d'en convenir dorénavant pour certains cas.

BASE DE DISCUSSION.

6. *Il y a présomption de la destination aux forces armées si l'envoi est adressé aux autorités ennemies ou à un commerçant dont il est notoire qu'il fournit à l'ennemi des objets et matériaux pour la guerre, ou s'il est à destination d'une place fortifiée ennemie ou d'une autre place servant de base d'opérations aux forces armées ennemies, à moins qu'il ne s'agisse d'établir le caractère du navire même qui fait route vers une de ces places. Dans les autres cas la destination est présumée innocente. Les présomptions ci-dessus admettent la preuve contraire.*

OBSERVATIONS.

Sans discuter ici si des principes nouveaux devraient être introduits, on peut constater que les Mémorandums déclarant représenter les règles existantes sont unanimes à considérer que la destination de la marchandise prouve son caractère de contrebande.

BASE DE DISCUSSION.

7. *La destination de la marchandise décide de son caractère de contrebande.* (Ibid., p. 69.)

Discussion of Bases.—Basis of discussion No. 5 was "Une destination spèciale aux forces armées de l'ennemi est nécessaire pour rendre saisissables les articles de contrebande conditionnelle." When this came before the Conference the German delegation proposed to substitute for the words "de l'ennemi" the words "ou aux administrations de l'Etat ennemi." In sustaining this change the German plenipotentiary said:

Selon notre avis, à la destination aux forces armées de l'ennemi devrait être assimilée la destination à ses administrations. La même idée a déjà été exprimée dans les propositions françaises relatives à la contrebande, soumises à la Deuxième Conférence de la Paix, dont l'article 4 était ainsi conçu:

"S'il est établi qu'un article spécialement déclaré contrebande de guerre a, au moment de la saisie, non seulement une destination ennemie, mais une destination réelle aux forces militaires ou navales ou aux *services de l'Etat ennemi*, cet article est sujet à confiscation." (Ibid., p. 138.)

Later the British delegation, in offering a *projet* upon contraband of war, stated this rule as follows:

Une destination spéciale aux forces armées de l'ennemi ou à l'administration de l'Etat ennemi est nécessaire pour rendre saisissables les articles de contrebande conditionnelle. (Ibid., Art. 11, p. 251.)

The German delegation said that this form was in accord with their views:

Elle vise en effet le cas d'articles destinés aux forces armées et aux administrations de l'Etat ennemi, et la manière de voir exprimée à ce sujet paraissait d'autant plus nécessaire à adopter que le projet britannique ne tient pas compte des propositions tendant à ajouter à la liste des objets de contrebande absolue certains articles, tels que l'or, l'argent, les rails de chemins de fer, qui, tout en étant susceptibles d'usages pacifiques, peuvent servir à augmenter la force militaire d'un belligérant. Il enregistre donc avec satisfaction le fait que l'article 11 permet

la saisie de ces articles quand ils sont destinés à être employés dans l'intérêt de la Puissance ennemie. (Ibid., p. 200.)

Basis No. 6, which was sometimes coupled with the discussion of Basis No. 5, was as follows:

6. Il y a présomption de la destination aux forces armées si l'envoi est adressé aux autorités ennemies ou à un commerçant dont il est notoire qu'il fournit à l'ennemi des objets et matériaux pour la guerre, ou s'il est à destination d'une place fortifiée ennemi ou d'une autre place servant de base d'opérations aux forces armées ennemies, à moins qu'il ne s'agisse d'établir le caractère du navire même qui fait route vers une de ces places. Dans les autres cas la destination est présumée innocente. Les présomptions ci-dessus admettent la preuve contraire. (Ibid., p. 120.)

In the discussion of this basis various opinions were brought forward. Among these were:

M. le Vice-Amiral Roëll: Dans le No. 6 des bases de discussion, il est stipulé qu'il y a présomption de la destination aux forces armées si l'envoi est adressé à un commerçant dont il est notoire, etc.

Or, je ne trouve pas cette définition très claire; il se peut, selon la rédaction de l'article, qu'on envisage un commerçant neutre ou seulement un commerçant ennemi. Quant à moi, je crois que l'intention vise seulement les commerçants ennemis, et c'est pour cela que je propose de faire suivre le mot "commerçant" des mots "résidant dans le pays ennemi."

M. Crowe fait remarquer que la nature du commerce du destinataire peut modifier la présomption de contrebande. C'est ainsi que des commerçants appelés "agents commissionnaires," tout en ayant un contrat avec leur Gouvernement pour la livraison de certains articles, reçoivent des objets de nature tout à fait variée, et que la marchandise prohibée qui leur serait adressée, peut très bien être tout à fait en dehors de la catégorie d'articles qui tombent sous l'application de leur contrat avec le Gouvernement, de sorte que l'envoi ne presente pas, dans ce cas, le même caractère de violation des droits de la neutralité. C'est pour cette raison qu'il y aurait lieu d'ajouter au texte de la base dont il s'agit les mots "de cette nature." (Ibid., p. 138.)

The German delegation proposed to insert after the words "base d'opérations" the words "ou de ravitaillement." (Ibid., p. 138.)

The Dutch delegation would add the words "résidant en pays ennemi" after "commerçant." (Ibid., p. 235.)

The Italian delegation proposed to substitute the following rule:

La destination spéciale aux usages de la guerre sera établie par des circonstances se rattachant soit à la destination territoriale ou à la per-

sonne du destinataire, soit aux modalités du chargement. La preuve contraire est admise. (Ibid., p. 239.)

The British suggested the addition of the words "de cette nature" after "objets et matériaux." (Ibid., p. 239.)

The United States delegation suggested the suppression of the words "d'opérations" after "base." (Ibid., p. 242.)

Adaptation to modern conditions.—The extension of the area of jurisdiction of many States so that the area of hostile operations may be so remote that an act in one part of the dominions of a State may have no relation to military operations in another part of the dominions is a modern phenomenon. European wars may now have little effect upon a remote dependency. In order that the rights of neutrals may not be unduly disturbed without corresponding advantage to the belligerents it was deemed best at the International Naval Conference to recognize that the area of operations should be somewhat limited. This is provided for in Article 33 of the Declaration of London.

Art. 33. Conditional contraband is liable to capture if it is shown that it is destined for the use of the armed forces or of a government department of the enemy State, unless in this latter case the circumstances show that the articles can not in fact be used for the purposes of the war in progress. This latter exception does not apply to a consignment coming under Article 24 (4). (International Law Topics, Naval War College, 1909, p. 79.)

Of this Article the general report gives a somewhat full explanation.

The rules which relate to conditional contraband differ from those which have been laid down for absolute contraband in two respects: (1) There is no question of destination for the enemy in general, but of destination for the use of his armed forces or government authorities; (2) the doctrine of continuous voyage is excluded. Articles 33 and 34 refer to the first and Article 35 to the second principle.

The articles included in the list of conditional contraband may serve for peaceful uses as well as for hostile purposes. If, from the circumstances, the peaceful purpose is certain, their capture is not justified; it is otherwise if a hostile purpose is to be assumed, which happens,

for instance, in the case of foodstuffs destined for an enemy army or fleet, or of coal destined for an enemy fleet. In such a case there is clearly no doubt. But what is the decision when the articles are destined for the civil authorities of the enemy State? It may be the money sent to a civil authority which is to be used in the payment of salaries of its officials, or rails sent to a department of public works. In these cases there is *enemy destination* rendering the goods liable in the first place to capture, and subsequently liable to condemnation. This is explained by reasons at once juridical and practical. The State is a unit, although the functions necessary for its action are intrusted to different authorities. If a civil department may freely receive food or money, it is not advantageous to that department alone, but to the entire State, including its military administration, since the general resources of the State are thereby increased. Further, what a civil department receives may be considered of greater use to the military administration and may be directly assigned to the latter. Money or food really destined for a civil department may thus come to be used directly for the needs of the army. This possibility, which is always present, shows why destination for the authorities of the enemy State is assimilated to the destination for its armed forces.

It is the *authorities of the State* which are dependent on the central power that are in question, and not all the authorities which may exist in the enemy State. Local and municipal authorities, for instance, are not included, and what is destined for their use would not be regarded as contraband.

War may be waged in circumstances such that the destination for the use of a civil authority can not be questioned, and consequently can not give to the goods the character of contraband. For instance, a war exists in Europe, and the colonies of the belligerent countries are not, in fact, affected by the war. Food or other articles in the list of conditional contraband destined for the use of a civil authority of a colony would not be regarded as contraband of war, because the considerations adduced above do not apply in this case. It would not be possible to draw for the needs of the war on the resources of such civil government. Exception is made in case of gold, silver, or paper money, because a sum of money can easily be sent from one end of the world to the other. (Ibid., p. 79; Correspondence and Documents, International Naval Conference, British Parliamentary Papers, Misc. No. 4 (1909), p. 48.)

SOLUTION.

The contention of the master is correct. The commander of the cruiser should allow the vessel to proceed.

Situation VI.

TRANSFER TO ANOTHER FLAG.

(It is granted in this Situation that the Declaration of London is binding.)

There is war between the United States and State X. Great Britain is neutral. A vessel is met at sea having on board a bill of sale showing that the sale was made by the owner, a merchant of State X, to a British company twenty days before the outbreak of hostilities.

The captain of the United States cruiser which meets this vessel is in doubt what course to pursue, as the papers seem to be in regular form, though the vessel is engaged in trade similar to that before her transfer.

What should he do?

SOLUTION.

Unless the captain of the United States cruiser has other grounds than the fact that the merchant vessel is engaged in trade similar to that in which she was engaged before her transfer, he should release the vessel.

NOTES.

Topic and conclusion in 1906.—At the Naval War College conference on international law in 1906 the subject of transfer of flag of merchant vessels in time of war was considered. The following was the phrasing of the topic and conclusion:

TOPIC II.

What restrictions should be placed upon the transfer of flags of merchant vessels during or in anticipation of war?

CONCLUSION.

(*a*) The transfer of vessels, when completed before the outbreak of war, even though in anticipation of war, is valid if in conformity to the laws of the State of the vendor and of the vendee.

(*b*) The transfer of a private vessel from a belligerent's flag during war is recognized by the enemy as valid only when bona fide and when the title has fully passed from the owner and the actual delivery of the

vessel to the purchaser has been completed in a port outside the jurisdiction of the belligerent States in conformity to the laws of the State of the vendor and of the vendee. (International Law Topics and Discussions, 1906, p. 21.)

A brief summary of the general practice as regards commerce was at that time given as follows:

Any restriction on the sale of vessels in the time of war would be a restriction on commerce. As a general rule, a citizen of a neutral State may carry on commerce in the time of war as in the time of peace. It is generally admitted also that a belligerent has a right to take reasonable measures to bring his opponent to terms. It has been held that a neutral may be under obligation to use "due diligence" in order that acts hostile to either belligerent may not be undertaken within its jurisdiction. The arbitrators in case of the *Alabama* declared that "due diligence" should be "in exact proportion to the risks to which either of the belligerents may be exposed from a failure to fulfill the obligations of neutrality on their part." Citizens of neutral States can not perform certain services for a belligerent without rendering themselves or their property liable to treatment as hostile. How far the neutral State is bound to interfere in order to prevent its citizens from engaging in certain transactions is not fully determined. Ordinarily commercial transactions which can not affect the issue of the war are permitted.

In certain respects the purchase of goods belonging to a belligerent by a neutral may be a most effective method of freeing them from liability to capture. In the case of vessels sold by a subject of one State to a subject of another State, the transfer to the flag of the nation of the new owner ordinarily follows.

A vessel purchased from a subject of a belligerent by a subject of a neutral State would then pass under the protection of the neutral State and be exempt from capture. There is a great probability, therefore, that transfers will be made solely for the purpose of obtaining the protection of a neutral flag. Such transfers might not be of the nature of a valid sale. The opposing belligerent has therefore exercised the right of testing the validity of the transfer before the prize court. The continental practice has been more in the direction of regarding all sales made with a knowledge of the existence of war as invalid. There have been many cases before the American and British courts. In these courts the neutral purchaser is generally under obligation to establish the validity of his claim to the ownership by abundant proof. (Ibid., p. 21.)

The question of transfer of flag raised by Great Britain.—The subject of "transfer of merchant vessels from a belligerent to a neutral flag during or in contemplation of hostilities" was suggested by Great Britain as one of the questions of the program of the International Naval

Conference at London in 1908. The subject had received much attention in Great Britain, and cases involving transfer had often been before the English courts. The memorandum submitted to the Conference by the British Government referred to many adjudicated cases. It was as follows:

1. The assignment, either by sale or gift, to a neutral of an enemy ship, other than a ship of war, is not rendered invalid merely by the fact that it was made during or in contemplation of hostilities.

2. Such an assignment is not, however, valid if—

(*a*) It is made in a blockaded port.

(*b*) It is made in the course of a voyage. For this purpose a voyage is at an end as soon as the ship reaches a port where she can actually be delivered into the possession of the transferee.

(*c*) The vendor retains any share in the ship, or if there is an agreement to reconvey her at the end of the war.

3. The onus of proving that the transfer is genuine lies on the claimant, and the assignment must be complete, *bona fide*, and for good consideration.

A vessel transferred to a neutral flag is therefore still liable to be condemned by the prize court if the circumstances of the transfer are attended with suspicion not removed by the claimant; as, for example, if—

(*a*) No documentary evidence of the assignment is found on board at the time of the seizure;

(*b*) The transferrer has any control over the ship, reservation of profits, or power to revoke the assignment;

(*c*) Possession has not been taken by the alleged transferee or by some agent of his who is not an enemy;

(*d*) The ship is under the control of an enemy;

(*e*) The master or other person in command is in the service of an enemy. (Correspondence and Documents, International Naval Conference, British Parliamentary Papers, Misc. No. 4 (1909), p. 10.)

Prof. Westlake, citing pertinent sentences from the case of the *Baltica* (11 Moore Privy Council Cases, p. 141), says of transfer of flag from the British point of view:

Further, a ship may have been transferred by enemies to friends with all the external completeness necessary by the laws of the neutral country for the grant of its flag, but the vendors may have retained an undisclosed interest, the apparent transaction being only a blind to avoid capture. In that case it is thought to be no want of respect to the flag she bears that it shall not protect her. Belligerents, conceiving themselves to have a right to all enemy property at sea, call the transaction a fraud on their rights, and the honor of the neutral

State is not thought to be engaged in the protection of fraud. To cut short all tedious and often baffling investigations into such frauds, the French practice, dating as far back as the Règlement of 1694 and confirmed by that of 1778, ignores all sales of ships by enemies not made by authentic acts previous to the declaration of war or the commencement of hostilities. The English practice lays down no rigid rule except one which it applies to cargoes as well as to ships, namely, that "in case of war, either actual or imminent * * * a mere transfer by documents which would be sufficient to bind the parties is not sufficient to change the property as against captors as long as the ship or goods remain *in transitu*. * * *" The true ground on which the rule rests * * * is that while the ship is on the seas the title of the vendee can not be completed by actual delivery of the vessel or goods. The difficulty of detecting frauds if mere paper transfers are held sufficient is so great that the courts have laid down that in order to defeat the captors the possession as well as the property must be changed before the seizure. * * * The only question of law which can be raised is how long the *transitus* continues and when and by what means it is terminated. * * * It is true that in one sense the ship and goods may be said to be *in transitu* till they have reached their original port of destination, but "for the present purpose" the *transitus* ceases when the property has come into the actual possession of the transferee, as it may do by the ship's calling at an intermediate port where the transferee can take possession. (International Law, Part II, War, p. 149.)

When a transfer of a ship made earlier than the commencement of her voyage is presented to the court, "the circumstances attending a sale are severely scrutinized, and a transfer is not held to be good if it is subjected to any condition or even tacit understanding by which the vendor keeps an interest in the vessel or the profits, a control over it, a power of revocation, or a right to its restoration at the conclusion of the war." Moreover, the neutral "claimant shall be held to strict proof of ownership, and any circumstances of fraud or contrivance, or attempt at imposition on the court in striving to make out his title, shall be taken as fatal." The court "looks for that correspondence and other evidence which naturally attends a transaction, accompanies it or follows it, and which when it bears upon the face of it the aspect of sincerity will always receive its due weight," rather than "to documents of a formal nature * * * often procured with extraordinary facility." The ship has been left in the trade and under the management of the former owner. Wherever that fact appears the court will hold it to be conclusive, because from the *evidentia rei* the strongest presumption necessarily arises that it is merely a covered and pretended transfer.

Where the character of a ship sailing under a neutral flag is not open to question on the ground of any transfer, but the character of the persons who were and are owners has changed during her voyage, it is

their character at the time of the capture that will determine her fate. (Ibid., p. 150.)

Decisions of the British Court of Admiralty show that a transfer of a merchant ship from a belligerent to a neutral will not be regarded as valid if the sale is conditional and may be withdrawn (the *Minerva*, 6 C. Robinson Admiralty Reports, 399), if the transfer is not complete and the new owner in possession (the *Vrouw Margaretha*, 1 C. Robinson Admiralty Reports, 336), if the payment of purchase money has not been made (the *Argo*, 1 C. Robinson, Admiralty Reports, 158), and if *bona fides* is not observed in the transaction (the *Ariel*. 11 Moore, Privy Council Cases, p. 119).

On the subject of transfer of merchant vessels to a neutral flag the instructions given to the British delegation to the International Naval Conference of 1908 were as follows:

> The point of difference between the Powers on the question of the transfer to a neutral flag is, broadly, whether *bona fide* transfers after the outbreak of war, or within a fixed period before the war, are or are not permissible. Some Powers hold such transactions to be invalid. Great Britain, and several other Powers, adopt the view that, subject to certain conditions, such transfer is legitimate, but that it is for the purchaser to establish the *bona fides* of the transaction. A rule excluding altogether the right of transfer after the commencement of war appears to His Majesty's Government to be too serious a burden to impose on any country which carries on a large trade in building and selling ships. The equity of the case seems to demand that transfer should be permissible, but that the belligerent should be entitled to inquire closely as to the *bona fides* of the transaction, and that the onus should be on those concerned therein to establish that the transfer was complete and the transaction was genuine. His Majesty's Government think that the British delegates should maintain this view at the conference. They hope that it may be possible to convince the representatives of the other powers of its justice, and that an agreement may be arrived at on the subject. It seems, however, doubtful whether any such agreement could be established on the basis of a statement or an interpretation of existing law, and the solution may accordingly have to be sought by way of a conventional stipulation. (Correspondence and Documents, International Naval Conference, British Parliamentary Papers, Misc. No. 4 (1909), p. 31.)

Opinion of the United States Supreme Court.—The United States Supreme Court, in passing judgment in

1900 upon the case of the *Benito Estenger*, captured during the Spanish-American War, refers to the opinion of Hall and quotes from the following paragraph:

> The right which a neutral has to carry on innocuous trade with a belligerent of course involves the general right to export from a belligerent State merchandise which has become his by *bona fide* purchase. Vessels, according to the practice of France, and apparently of some other States, are, however, excepted on the ground of the difficulty of preventing fraud. Their sale is forbidden, and they are declared good prize in all cases in which they have been transfered to neutrals after the buyers could have knowledge of the outbreak of war. In England and the United States, on the contrary, the right to purchase vessels is in principle admitted, they being in themselves legitimate objects of trade as fully as any other kind of merchandise, but the opportunities of fraud being great, the circumstances attending a sale are severely scrutinized. and a transfer is not held to be good if it is subjected to any condition or even tacit understanding by which the vendor keeps an interest in the vessel or its profits, a control over it, a power of revocation, or a right to its restoration at the conclusion of the war. (Hall International Law, 5th ed., p. 505.)

The transfer of the *Benito Estenger* from the Spanish to the British flag was held to be merely colorable, "which furnished in itself ground for condemnation."

The French system and theory.—The French point of view, which is held by some other continental States, is set forth by Dupuis in such fashion as may well be quoted at length:

> En ce qui concerne les navires, "la nationalité," disaient les instructions françaises du ministre de la marine, en date du 25 juillet 1870, "ne dérive pas seulement de celle de leurs propriétaires, mais encore de leur droit légitime au pavillon qui les couvre." La formule n'est pas très précise; elle demande à être expliquée. Mais les précédents, la jurisprudence constante des conseils de prises ne laissent aucun doute sur sa portée; elle signifie que la nationalité du navire est liée au droit au pavillon.
>
> Tout navire ayant droit de porter pavillon, ennemi est ennemi; tout navire ayant droit de porter pavillon neutre est neutre.
>
> Peu importe la nationalité des propriétaires. Généralement, les propriétaires de navires sont sujets de l'Etat dont leur vaisseau porte pavillon; la plupart des législations subordonnent l'acquisition du droit au pavillon à la condition que la plus grande partie du bâtiment appartienne à leurs nationaux. Si la propriété du navire est divisée entre sujets d'Etats différents, le système français rend le sort du vaisseau, en tout cas, indivisible; le pavillon ennemi entraîne confis-

cation des parts qui appartiennent à des propriétaires neutres; le pavillon neutre emporte libération des parts des propriétaires ennemis.

La qualité neutre ou ennemie des propriétaires est d'ailleurs essentiellement liée à leur nationalité; quels que soient leur domicile ou leurs occupations, les sujets de l'ennemi, partout et toujours, sont ennemis et sont seuls ennemis; les sujets d'Etats neutres conservent, en tout cas, leur qualité de neutres.

Le sort indivisible du navire ne peut être modifié par la division de la propriété; il ne peut l'être davantage par le démembrement de la propriété. L'hypothèque prise sur un navire ne permet pas au créancier qui s'en prévaut de revendiquer son gage; l'hypothèque est sans valeur si le navire est sujet à capture.

Que la confiscation atteigne, en principe, tout navire portant pavillon ennemi par cela seul qu'il porte ce pavillon, cela est un effet naturel de l'interdiction de l'usage de la mer, résultant de l'état de guerre. C'est au pavillon ennemi que s'adresse avant tout cette interdiction; c'est lui que l'adversaire prétend tout d'abord dépouiller du bénéfice de la liberté des mers. Logiquement lui seul, semble-t-il, devrait être touché. Le système français toutefois ne se tient pas à la stricte logique; quelles que soient ses préférences pour elle, il a dû s'en affranchir sous peine de laisser à l'ennemi un moyen trop simple de se mettre à couvert; il l'a fait d'ailleurs d'une façon radicale.

Si le pavillon neutre suffisait, en tout cas, à exempter de la capture, les armateurs avisés ne manqueraient pas, au début de la guerre, de vendre aux neutres leurs vaisseaux ménacés; ou plutôt encore ils feindraient une vente pour les mettre à l'abri durant la lutte et les recouvrer, le danger passé, lorsque la guerre serait terminée.

Mille formes diverses pourraient être employées pour réserver leurs droits et déjouer l'ennemi. Afin de couper court à toutes les ruses, l'édit de juillet 1778 proclame la nullité de toute cession de navire ennemi consentie après l'ouverture des hostilités. De peur qu'une antidate ne vienne mettre en échec sa prévoyance, l'édit de 1778 subordonne la validité d'une vente antérieure au début des hostilités à la constatation du contrat par un acte authentique. Ainsi le pavillon neutre est sans valeur pour le navire qui ne l'a pas acquis d'une façon certaine, indiscutable, avant que la guerre éclatât. Son acquisition ou manifestement tardive ou de date douteuse reste sans effet, et le navire réputé ennemi demeure sujet à capture.

Cette extension du caractère ennemi à des vaisseaux battant pavillon neutre est d'ailleurs la seule qu'admette notre système. Elle pourrait être l'occasion de conflits avec les pays qui autorisent leurs nationaux à acheter, durant la guerre, des navires appartenant à des sujets belligérants; mais un certain nombre d'Etats, pour prévenir ces conflits, prohibent en pareil cas l'achat; et d'autres, tout en tenant l'acquisition pour bonne et leur pavillon pour légitime, n'entendent cependant pas le protéger à l'encontre du belligérant qui le méconnaît; ils permettent à leurs sujets d'acquérir, ils les préviennent que c'est à

leurs risques et périls: telle est la solution britannique. (Le droit de la guerre maririme, secs. 96, 97, pp. 126–128.)

Russian regulations.—The Russian regulations are in general opposed to any transfer after declaration of war.

Merchant vessels acquired from a hostile power or its subjects by persons of neutral nationality are acknowledged to be hostile vessels unless it is proven that the acquisition must be considered, according to the laws of the nation to whom the purchasers belong, as having actually taken place before the purchasers received news of the declaration of war, or that the vessels acquired in the manner mentioned, although after the receipt of such news, were acquired quite conscientiously and not for the purpose of covering hostile property. (Foreign Relations, U. S., 1904, p. 736.)

Japanese regulations.—The Japanese regulations of 1904 look to the good faith of the transactions.

ART. VI. The following are enemy vessels: * * *

4. Vessels, the ownership of which has been transferred before the war, but in expectation of its outbreak or during the war, by the enemy State or its subjects to persons having residence in Japan or a neutral State, unless there is proof of a complete and *bona fide* transfer of ownership.

In case the ownership of a vessel is transferred during its voyage, and actual delivery is not effected, such transfer of ownership shall not be considered as complete and *bona fide*. (Naval War College, International Law Topics, 1905, Appendix, p. 192.)

Attitude of States in 1908.—The attitude of the States mainly affected by transfers in time of war is shown in the propositions put before the International Naval Conference at London in 1908.

Germany proposed a period prior to the opening of hostilities during which transfer would not be valid:

ART. 3. Le caractère neutre ou ennemi d'un navire de commerce est déterminé par le pavillon qu'il porte.

Un navire battant pavillon neutre pourra néanmoins êtré traité en navire ennemi—

1. Si, jusqu'à l'ouverture des hostilités ou dans les deux semaines qui l'ont précédée, il a porté le pavillon ennemi. (Proceedings of the International Naval Conference, British Parliamentary Papers, Misc. No. 5 (1909), p. 112.)

Austria-Hungary explains its position in regard to transfer as follows:

(G) D'après la pratique de presque tous les Etats, la vente d'un navire ennemi faite en cours de voyage et après l'ouverture des hostilités ne

peut empêcher la capture du navire, celui-ci continuant, dans les circonstances dont il s'agit, d'être considéré comme ennemi.

L'ancienne théorie française, en vertu de laquelle les navires ennemis ne pourraient, à partir du commencement des hostilités, changer de nationalité, c'est-à-dire perdre leur qualité de navires ennemis, comporte une restriction exagérée du commerce neutre, puisque ce commerce doit, en principe, rester libre, même en temps de guerre. La France elle-même a, d'ailleurs, dérogé à cette théorie en 1870.

Le § 26 du projet d'un règlement des prises, voté par l'Institut de droit international dans sa session de Turin, semble contenir une solution de la question d'autant plus heureuse qu'elle tient compte des intérêts des belligérants et des neutres. Ledit paragraphe est ainsi conçu:

"L'acte juridique constatant la vente d'un navire ennemi faite durant la guerre doit être parfait, et le navire doit être enregistré conformément à la législation du pays dont il acquiert la nationalité, avant qu'il quitte le port de sortie. La nouvelle nationalité ne peut être acquise par une vente faite en cours de voyage."

Rien ne s'oppose, d'ailleurs, à l'établissement de garanties supplémentaires contre la lésion, au moyen de ventes fictives opérées par les ressortissants de l'un des belligérants, des intérêts légitimes de l'autre belligérant. (Ibid., p. 112.)

Spain affirms the British point of view as stated already:

(G) Le gouvernement de S. M. C. estime acceptables les règles suggérées par le Cabinet de Londres dans la section 7 de son Mémorandum. Lorsque le changement de pavillon du navire correspond à un transfert effectif de propriété ou à d'autres motifs d'ordre privé, sa validité sera reconnue; mais s'il est l'effet de l'intention de se dérober par une simulation aux risques existant aujourd'hui pour la propriété privée ennemie en cas de guerre maritime, il doit être réputé nul. (Ibid., p. 112.)

France proposes more definite regulations than those previously announced by that state:

(G) Le changement de nationalité des navires de commerce effectué *après* la déclaration de guerre est nul et sans effet. Le transfert *antérieur* à la déclaration de guerre, régulièrement intervenu, est valable. La date du transfert sous pavillon neutre antérieurement à la déclaration de guerre doit être établie par des pièces authentiques trouvées à bord, et la cession doit avoir été suivie d'un enregistrement devant les autorités compétentes.

On doit tenir pour suspect un acte de naturalisation intervenu de la part d'un gouvernement neutre en faveur du propriétaire du navire, postérieurement à la déclaration de guerre. Il faut, dans ce cas, agir suivant les circonstances et les autres indices recueillis, notamment suivant le lieu de construction du navire, la composition de son équipage, l'observation des conditions nationales imposées au pavillon arboré. (Ibid., p. 113.)

Italy cites its existing law and decisions:

(g) "La nationalité italienne ne pourra être accordée à aucun navire provenant de la vente qui en aurait été faite par un individu sujet d'une Puissance se trouvant en état de guerre avec une autre Puissance qui serait en état de paix avec le gouvernement du Roi.

"Le ministre de la marine pourra toutefois, si la vérité de la vente est constatée, accorder la nationalisation du navire." (*Cod. M. M.*, art. 42.)

Il résulte de cette disposition que, selon l'esprit du droit positif italien, la vente d'un navire ennemi à un acheteur neutre, *après l'ouverture des hostilités*, est présumée fictive, et, comme telle, ne saurait être reconnue. La preuve du contraire est toutefois admise avec des garanties tout à fait spéciales.

Le Conseil du contentieux diplomatique s'est prononcé dans un sens analogue. Il a déclaré, en effet, que la translation de la propriété d'un navire ne saurait être considérée valable si elle ne résulte pas des papiers de bord, et qu'il n'y aurait pas lieu de tenir compte d'une vente qui n'aurait pas pu être enregistrée sur ces documents par suite du fait que le navire se trouvait en cours de voyage. Il résulte toutefois de l'ensemble de l'avis que la preuve de la réalité et de la légalité de la vente est admise. (*Cont. dipl.*, 16 juin 1866, capture du navire "*Venezia*." (Ibid., p. 113.)

Japan expanded slightly its regulations of 1904:

Le transfert de propriété d'un navire au cours ou en prévision de la guerre par l'Etat ennemi, ou par une personne ennemie à une autre personne ayant son domicile dans l'autre Etat belligérant ou chez son allié ou dans un Etat neutre, n'est valable que si une preuve suffisante d'une cession complète et de bonne foi est apportée.

Dans le cas où la propriété d'un navire est cédée pendant qu'il effectue son voyage, cette cession ne doit pas être considérée comme de bonne foi et complète jusqu'à la livraison effective. (Ibid., p. 114.)

The Netherlands proposition looked toward a large degree of freedom:

VII. (1) La validité du transfert de navires de commerce du pavillon belligérant au pavillon neutre au cours ou au début des hostilités est reconnue sans restrictions.

(2) Un navire de commerce transféré du pavillon belligérant au pavillon neutre dans un port ou sur une côte bloquée ne peut réclamer le traitement accordé au pavillon neutre. (Ibid., p. 114.)

The Russian proposition was somewhat shorter than the regulations announced in 1904:

VII. Les belligérants ont le droit de ne point reconnaître le caractère neutre de tout bâtiment de commerce acheté par des personnes neutres à un Etat ennemi ou à un de ses ressortissants, à moins que le nouveau propriétaire ne prouve que l'acquisition est devenue définitive avant qu'il eût connaissance du commencement de la guerre. (Ibid., p. 114.)

In proposing a basis of discussion for the International Naval Conference it was said:

On ne saurait admettre le transfert dont un navire est l'objet en vue d'échapper aux conséquences qu'entraîne pour lui sa qualité de navire ennemi.

La plupart des Mémorandums, exposant le droit actuel, ont suivi des voies différentes pour interpréter et pour appliquer ce principe commun. La preuve étant difficile en pareille matière, des présomptions simples ou absolues, plus ou moins justifiées, ont été posées, notamment lorsque le transfert a lieu au cours des hostilités. En pareil cas la présomption absolue de nullité ne constitue pas, d'après tous les Mémorandums, une règle générale sauf dans le cas de transfert en cours de voyage.

Avant l'ouverture des hostilités la pratique commune aboutit à reconnaître la validité du transfert toutes les fois que ce transfert est régulièrement intervenu, c'est-à-dire qu'il ne comporte rien de fictif ou d'irrégulier qui le rende suspect. (Ibid., p. 114.)

The basis of discussion took the following form:

35. Un navire ne peut pas être transféré sous pavillon neutre en vue d'échapper aux conséquences qu'entraîne pour lui sa qualité de navire ennemi.

36. Le transfert effectué avant l'ouverture des hostilités est valable s'il est régulièrement intervenu, c'est-à-dire s'il ne comporte rien de fictif ou d'irrégulier qui le rende suspect.

37. Après l'ouverture des hostilités, il y a présomption absolue de nullité du transfert qui est effectué pendant que le navire est en voyage. (Ibid., p. 114.)

Discussion at the International Naval Conference, 1908–9.—When the above basis of discussion came before the conference, Dr. Kriege, the German plenipotentiary, said:

Nous sommes d'accord avec les auteurs du sommaire sur le principe qu'un navire ne peut pas être transféré sous pavillon neutre en vue d'échapper aux conséquences qu'entraîne pour lui sa qualité de navire ennemi. Mais au point de vue du droit existant, comme pour des considérations d'ordre pratique, nous voudrions bien voir adopter le système de notre Mémorandum, qui aurait le double avantage de faciliter la tâche des commandants de croiseurs et d'éviter des surprises au commerce neutre. Les commandants de croiseurs sauraniet toujours s'ils devraient, oui ou non, respecter le pavillon neutre d'un navire qu'ils rencontreraient en mer. Les armateurs neutres, d'autre part, sauraient à quoi s'en tenir, et ne courraient pas le risque de voir saisir, et, peut-être, déclarer de bonne prise un navire dont le transfert, opéré de bonne foi, serait, pour une raison quelconque, suspect à ces officiers navals. (Ibid., p. 166.)

In explanation Mr. Crowe, of the British delegation, said—

Le principe que l'on a voulu exprimer dans la base 35 est celui que le Gouvernement britannique a cru pouvoir dégager des Mémorandums, c'est-à-dire qu'un commerçant, sujet de l'Etat belligérant, ne saurait éluder les conséquences de la guerre en transférant ses navires sous pavillon neutre. Pour l'application de ce principe, il est difficile de trouver parmi les Mémorandums une règle à la fois précise et généralement reconnue. Le principe une fois accepté dans ses conséquences, il ne serait pas difficile, après un examen suffisamment approfondi, de trouver quelques règles pour gouverner sa mise à exécution. Ainsi, par exemple, dans la base 37 on a formulé une présomption utile et qui paraît être à peu près universellement reconnue.

Il est certain que, au cours de chaque guerre, les cours des prises auront à se prononcer sur nombre de ventes faites de bonne foi, puisqu'il y aura toujours un commerce régulier en navires comme en d'autres objets. Le caractère licite ou illicite d'une vente de ce genre est naturellement une pure question de preuve. Il s'agit de pourvoir à la protection de telles transactions en formulant des règles qui laissent toute liberté à ce commerce en tant qu'il est fait de bonne foi, et si, comme il le croit, les Puissances désirent préciser de telles règles, le Gouvernement britannique est tout disposé à leur prêter son concours. (Ibid., p. 167.)

The German delegation later proposed a new additional Article as follows:

Une pareille intention illicite est présumée lorsque le transfert est intervenu après l'ouverture des hostilités. La bonne foi des contractants est, au contraire, présumée lorsque le transfert a été effectué avant l'ouverture des hostilités. (Ibid., p. 179.)

The United States delegation proposed regulations embodying those approved by the Naval War College (International Law Topics and Discussions, 1906, p. 21), mentioning that these corresponded with existing treaties with certain of the States represented at the International Naval Conference.

35. Le transfert d'un navrie d'un pavillon à un autre avant l'ouverture des hostilités est valable, même dans le cas où il est fait en vue des hostilités, pourvu qu'il soit fait en conformité avec les lois nationales du vendeur et de l'acheteur.

36. Le transfert au cours des hostilités d'un navire privé portant le pavillon d'un belligérant n'est valable que lorsqu'il est de bonne foi, et que le transfert des droits du propriétaire est entier. Encore faut-il que la livraison du navire à l'acheteur soit complétée dans un

port en dehors de la juridiction des États belligérants conformément aux lois nationales du vendeur et de l'acheteur.

37. La bonne foi des contractants n'est présumée que lorsque le transfert a été effectué avant l'ouverture des hostilités.

Lorsque le transfert est intervenu après l'ouverture des hostilités, c'est aux contractants à établir sa validité. (Proceedings of the International Naval Conference, British Parliamentary Papers. Misc. No. 5 (1909), p. 245.)

Great Britain made a new proposition and submitted reasons therefor:

35. La bonne foi est nécessaire dans le cas du transfert d'un navire sous pavillon neutre en vue d'hostilités.

36. Le transfert effectué avant l'ouverture des hostilités est présumé être régulièrement intervenu, c'est-à-dire, ne rien comporter de fictif ou d'irrégulier qui le rende suspect. La preuve contraire est admise.

37. Après l'ouverture des hostilités, il y a présomption absolue de nullité du transfert:

(*a*) S'il est effectué en cours de voyage ou dans un port bloqué;

(*b*) S'il y a faculté de réméré ou de retour;

(*c*) Si, après le transfert, le navire a été maintenu dans le service auquel il était affecté auparavant;

(*d*) Si les conditions auxquelles est soumis le droit de pavillon, d'après la législation du pavillon arboré, n'ont pas été observées.

37 *bis*. Le transfert est présumé être nul si l'acte de transfert ne se trouve pas à bord alors que le navire a perdu la nationalité belligérante au cours des hostilités ou moins de deux mois avant l'ouverture des hostilités. La preuve contraire est admise.

MOTIFS DE LA PROPOSITION.

Comme il a été expliqué par les "observations" (voir p. 59) sur les bases 35 et 36, ces bases ont l'intention d'exprimer le principe commun sur lequel sont fondées les différentes règles comprises dans les Mémorandums.

De ces Mémorandums il n'a été possible de déduire qu'une seule règle, applicable en pratique, de laquelle on puisse dire qu'elle a été acceptée à l'unanimité. C'est celle qui est consignée dans la base 37.

Au moment, cependant, où les représentants des différentes Puissances ont l'occasion d'entrer en discussion directe de cette question, la Délégation britannique se croit justifiée à déposer la proposition précédente par laquelle elle a formulé des règles que les Gouvernements représentés pourront considérer comme offrant une garantie suffisante du principe commun.

Si ces règles, dans leur ensemble, sont de nature à obtenir les résultats pratiques visés par les règles divergentes jusqu'à présent en vigueur, la Délégation aime à croire que, bien qu'elles aient été prises à des sources différentes et qu'elles représentent l'usage de nations diverses, elles

pourront, néanmoins, être considérées comme faisant partie du droit généralement reconnu. (Ibid., p. 244.)

Report of the commission to the International Naval Conference.—That part of the report presented to the full Conference by the commission, which was embodied in the General Report finally approved by the Conference, said:

Un navire de commerce ennemi est sujet à capture, tandis qu'un navire de commerce neutre est respecté. On comprend, dès lors, qu'un croiseur belligérant, rencontrant un navire de commerce qui se réclame d'une nationalité neutre, ait à rechercher si cette nationalité a été légitimement acquise ou si elle n'a pas eu pour but de soustraire le navire aux risques auxquels il aurait été exposé s'il avait gardé son ancienne nationalité. La question se présente naturellement quand le transfert est de date relativement récente, au moment où a lieu la visite, que ce transfert soit, du reste, antérieur ou postérieur à l'ouverture des hostilités. Elle est résolue différemment suivant qu'on se place plutôt au point de vue de l'intérêt du commerce ou plutôt au point de vue de l'intérêt des belligérants. Il est heureux que l'on se soit entendu sur un règlement qui concilie les deux intérêts dans la mesure du possible et qui renseigne les belligérants et le commerce neutre. (Ibid., p. 367.)

It was further said in the report presented to the Conference by the commission—

La solution la plus simple consisterait à faire une distinction tranchée entre la période qui précède et la période qui suit l'ouverture des hostilités. Dans la première, l'intérêt commercial prévaudrait, et tous les transferts opérés d'une manière regulière, juridiquement parlant, seraient maintenus et devraient être respectés par les belligérants. Dans la seconde, au contraire, ce serait l'intérêt des belligérants qui l'emporterait, et tous les transferts pourraient être considérés comme nuls par le belligérant dont ils auraient pour résultat d'entraver le droit de capture. Ce système serait d'une application facile pour les croiseurs qui n'auraient qu'à vérifier une date. Mais, comme tous les systèmes absolus, il donne lieu à des critiques, de nature opposée. Pour la période antérieure à l'ouverture des hostilités, l'intérêt d'un belligérant peut être gravement sacrifié, parce que, dans une période de tension politique, à la veille d'une guerre, des navires de commerce portant le pavillon de son adversaire pourront, grâce peut-être à un avertissement secret, être soustraits aux risques de la guerre par suite de transferts effectués rapidement. D'autre part, il est rigoureux d'annuler sans distinction tous les transferts postérieurs, parce que certains d'entre eux peuvent être motivés par le jeu naturel des transactions commerciales, et non par le fait même de la guerre; si donc il

est raisonnable de présumer alors que la nationalité neutre a été attribuée à un navire portant le pavillon d'un belligérant pour le faire bénéficier de la protection due à la neutralité, il est équitable d'admettre qu'en général la preuve contraire sera possible. (Ibid., p. 326.)

The proposition about which centered a protracted discussion was as follows:

Un transfert effectué avant l'ouverture de la guerre est valable s'il est absolu, complet, de bonne foi et conforme à la législation des pays intéressés, et s'il a pour effet que ni le contrôle du navire, ni le bénéfice provenant de son emploi ne reste plus entre les mêmes mains qu'avant le transfert.

Si le capteur peut établir que les conditions susmentionnées n'ont pas été remplies, le transfert est présumé être intervenu avec l'intention d'éluder les conséquences de la guerre, et il est nul. (Ibid., p. 326.)

There was much difference of opinion as to what constituted good faith (*bonne foi*). The report of the commission further said:

La validité du transfert est d'abord subordonnée à l'accomplissement de certaines conditions juridiques ayant pour but de démontrer que le propriétaire s'est bien dessaisi d'une manière définitive et sans réserve de la propriété du navire, sur laquelle il ne doit conserver aucun contrôle. Si ces conditions ne sont pas remplies, par exemple, si l'effet du transfert a été subordonné à l'éventualité de la guerre, le transfert est présumé intervenu dans l'intention d'éluder les conséquences de la guerre, et il est déclaré nul. Cela sera simple. Voici le point difficile: toutes les conditions juridiques ont été remplies, mais le capteur est à même d'établir que ce transfert, régulier au fond et en forme, a été opéré en vue d'éluder les conséquences qu'entraîne le caractère ennemi. Sera-t-il admis à faire cette preuve pour arriver à faire déclarer nul le transfert? Ou bien l'intention d'éluder les conséquences de la guerre ne peut-elle résulter que de l'inaccomplissement des conditions juridiques? C'est douteux, a-t-il paru à quelques-uns; on a rappelé que la condition de bonne foi était exigée d'une manière distincte, indépendamment des conditions juridiques et qu'ainsi, même si ces conditions étaient remplies, on pouvait prouver que la vente avait été faite de mauvaise foi. Mais, comment celle-ci devait-elle être entendue? C'est le point délicat. Le capteur n'envisage évidemment pas la bonne foi de la même manière que le vendeur. Celui-ci estimera qu'il agit très loyalement s'il se défait régulièrement et définitivement de ses navires, parce qu'il ne veut pas courir le risque de les perdre par l'exercice du droit de prise. Le capteur pensera qu'il n'y a pas eu bonne foi à vouloir éluder les conséquences naturelles de la guerre.

Si on considère la simple interprétation juridique, il semble bien qu'une cour des prises, en présence de la proposition rapportée plus haut, tiendrait le transfert pour valable, dès que les conditions juridiques auraient été remplies, et ne se placerait pas au point de vue du capteur pour apprécier s'il y a eu bonne ou mauvaise foi. La majorité du comité n'acceptait pas cette conséquence, et, par suite, désirait une formule non équivoque. (Ibid., p. 327.)

The rule adopted by the International Naval Conference.—After long and careful consideration the following rule was adopted as Article 55 of the Declaration of London:

ART. 55. *The transfer of an enemy vessel to a neutral flag, effected before the opening of hostilities, is valid, unless it is proved that such transfer was made in order to evade the consequences which the enemy character of the vessel would involve. There is, however, a presumption that the transfer is void if the bill of sale is not on board in case the vessel has lost her belligerent nationality less than sixty days before the opening of hostilities. Proof to the contrary is admitted.*

There is absolute presumption of the validity of a transfer effected more than thirty days before the opening of hostilities if it is absolute, complete, conforms to the laws of the countries concerned, and if its effect is such that the control of the vessel and the profits of her employment do not remain in the same hands as before the transfer. If, however, the vessel lost her belligerent nationality less than sixty days before the opening of hostilities, and if the bill of sale is not on board, the capture of the vessel would not give a right to compensation.

The General Report of the Conference says of this Article 55:

The general rule laid down in the first paragraph is that the transfer of an enemy vessel to a neutral flag is valid, assuming, of course, that the ordinary legal requirements relative to validity have been fulfilled. It is for the captor, if he wishes to have the transfer annulled, to prove that the object of the transfer was to evade the consequences of the war in prospect. There is one case which is regarded as suspicious, that, namely, in which the bill of sale is not on board when the ship has changed her nationality less than sixty days before the opening of hostilities. The presumption of validity set up by the first paragraph

in favor of the vessel is transposed in favor of the captor. It is presumed that the transfer is void, but proof to the contrary may be admitted. With a view to establishing the contrary, proof may be given that the transfer was not made in order to evade the consequences of the war; it is unnecessary to add that the ordinary legal requirements relative to validity must have been fulfilled.

There was a wish to give to commerce a guarantee that the right to regard a transfer as void on the ground that it was made in order to evade the consequences of war should not extend too far and should not cover too long a period. Consequently, if the transfer has been made more than thirty days before the opening of hostilities, it can not be assailed on that ground alone, and it is regarded as unquestionably valid if it has been made under conditions which show that its character is genuine and final. These are as follows: The transfer must be absolute, complete, and in conformity with the laws of the countries concerned, and its effect is to place the control of and the profits earned by the vessel in other hands. When once these conditions are established, the captor is not allowed to contend that the vendor foresaw the war in which his country was about to be engaged, and wished by the sale to shield himself from the risks which he would incur in respect of the vessels he was transferring. Even in this case, however, if the vessel is encountered by a cruiser and her bill of sale is not on board, she may be captured if the change of nationality has taken place less than sixty days before the opening of hostilities; that circumstance renders her suspect. But if before the prize court she furnishes the proof specified by the second paragraph, she must be released, though she can not obtain compensation, inasmuch as there was sufficient reason for capturing the vessel. (International Law Topics, Naval War College, 1909, p. 123.)

Consideration of Article 55.—Article 55 of the Declaration of London states in general that when the bill of sale is on board "a transfer of an enemy vessel to a neutral flag before the opening of hostilities is valid, unless it is proved that such transfer was made in order to evade the consequences which the enemy character of the vessel would involve." When the bill of sale is on board and the transfer is made more than thirty days before the opening of hostilities and is absolute, complete, in conformity to the laws of the countries concerned, and "its effect is such that the control of the vessel and the profits of her employment do not remain in the same hands as before the transfer, there is absolute presumption of the validity of the transfer."

According to this Article 55, therefore, there are specifications as to what constitutes absolute presumption of

validity of transfer for vessels transferred more than thirty days before the opening of hostilities. For vessels having the bill of sale on board and transferred within thirty days of the opening of hostilities the general rule of the first paragraph would apply; i. e., the transfer "is valid, unless it is proved that such transfer was made in order to evade the consequences which the enemy character of the vessel would involve."

Application of Article 55 to Situation VI.—According to the statement of Situation VI there is war between the United States and State X. A United States cruiser meets a merchant vessel having regular papers and a bill of sale showing that she was sold by a merchant of State X to a British company twenty days before the opening of hostilities.

If the transfer had been made more than thirty days before the opening of hostilities and had been absolute, complete, in conformity to the laws of the countries concerned and the control and profits had not remained in the same hands as before the transfer, there would have been absolute presumption of the validity of the transfer. The transfer was, however, according to the bill of sale on board made twenty days before the opening of hostilities, and therefore this clause of Article 55 does not apply.

The bill of sale is on board the vessel, and all papers seem to be regular; therefore she seems to have conformed to the legal requirements so far as papers are concerned.

The transfer would therefore be valid according to Article 55 "unless it is proved that such transfer was made in order to evade the consequences which the enemy character of the vessel would involve."

The only evidence afforded by Situation VI that the transfer was to evade the consequences of enemy character is that "the vessel is engaged in trade similar to that in which she was engaged before her transfer." Is this evidence sufficient to justify the captain of the United States cruiser in sending the vessel in as prize or in taking any other action?

Application of doctrine of Article 56.—It was proposed at the International Naval Conference that when merchant vessels were transferred from a belligerent to a neutral flag after the opening of hostilities and remained in *the same trade,* there should be absolute presumption that the transfer was void. As is said in the General Report, referring to Article 56:

> Provision was at one time made for the case of a vessel which was retained, after the transfer, in the trade in which she had previously been engaged. This would be a circumstance in the highest degree suspicious; the transfer has a fictitious appearance, since nothing is changed as regards the vessel's trade. This would apply, for instance, in case the vessel maintained the same line of sailing before and after the transfer. It was, however, objected that the absolute presumption would sometimes be too severe, as certain vessels, for example, tankships, could, on account of their build, engage only in a definite trade. To recognize this objection, the word "*route*" was added, so that it would have been necessary that the vessel should be retained *in the same trade and on the same route;* it was thought that in this way there would be given to the contention sufficient consideration. However, in consideration of the insistence on the suppression of this case from the list, its suppression has been conceded. Consequently the transfer now comes within the provision of the general rule; it is certainly presumed to be void, but proof to the contrary is admitted. (International Law Topics, Naval War College, 1909, p. 127.)

As a transfer made after the opening of hostilities in which the vessel remained in *the same trade* is not necessarily void but admits of proof of its validity a transfer made before the war in which the vessel transferred engages in *similar trade* to that before the opening of hostilities would certainly not be hastily condemned.

Consideration of Article 64.—In this Situation VI, as in all cases of capture, there is a liability that the captor may have to pay compensation if there is not good reason for capturing a vessel. The Declaration of London of 1909 provides for this case in Article 64 and in the General Report on this Article, saying:

> ART. 64. *If the capture of a vessel or of goods is not upheld by the prize court, or if without being brought to judgment the captured vessel is released, those interested have the right to compensation, unless there were sufficient reasons for capturing the vessel or goods.*

A cruiser has captured a neutral vessel, for example, on the ground of carriage of contraband or violation of blockade. The prize court releases the vessel, declaring the capture void. This is evidently not enough to indemnify those interested for the loss incurred in consequence of the capture, and this loss may have been considerable, since the vessel has been during a period, often very long, prevented from engaging in her ordinary trade. May they claim to be compensated for this injury? Logically it is necessary that an affirmative answer should be given, if the injury is undeserved, that is to say, if the capture was not occasioned by some fault of the parties. It may, indeed, happen that the capture was for reason, since the master of the vessel visited and searched did not produce evidence which ought ordinarily to be available, and which was furnished later. In such a case it would be unjust that compensation should be awarded. On the other hand, if the cruiser has really been at fault, if she has made a capture in a case in which there were not sufficient reasons for doing so, it is just that compensation should be decreed.

It may also happen that a vessel which has been captured and taken into a port has been released by administrative action without intervention of a prize court. The practice in such circumstances varies; in some countries the prize court has jurisdiction only on the question of a capture, and can not adjudicate on a claim for compensation based upon the ground that the capture would have been held unjustifiable; in other countries the prize court would have competence in a claim of this kind. There is therefore a difference which is hardly equitable, and it is desirable to lay down a rule which will produce the same result in all countries. It is reasonable that every capture effected without sufficient reasons should give to those interested a right to compensation, without distinguishing as to whether the capture has or has not been followed by a decision of a prize court, and this is all the more reasonable when the capture may have so little justification that the vessel is released by executive action. A general provision capable of covering all cases of capture has therefore been adopted. (Ibid., p. 149.)

The merchant vessel which had been transferred to the British company was engaged in similar trade to that in which she had been engaged before her transfer. This might be natural for many reasons, particularly if the vessel was fitted by construction for a single line of trade as a tank steamer, or a cattle boat, or if the trade was confined to certain fairly defined routes. The fact that the trade was *similar* and not the *same* would seem to indicate that the transfer was one that could not easily be proven void.

As the captain would not wish without good reason to involve his State in an obligation to pay compensation he would take less risk in case of a vessel which had been transferred to another flag than in case of a vessel carrying articles of the nature of contraband which might be of direct service in war. The vessel under consideration in Situation VI is engaged in trade *similar* to that in which she was engaged before the war; but even if she were engaged in the *same* trade there would be no absolute presumption that the transfer was not valid. This would have to be established by additional evidence above the simple fact of the nature of the trade. It would therefore be incumbent upon the captain of a ship of war to have other reasons than continuance in similar trade in order that there should be reason sufficient to justify capture.

SOLUTION.

Unless the captain of the United States cruiser has other grounds than the fact that the merchant vessel is engaged in trade similar to that in which she was engaged before her transfer, he should release the vessel.

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